IN THE 283RD JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE RANDY HALPRIN, APPLICANT	§ § § § § § § § § §	CAUSE NO. W01-00327-T(B) CASE INVOLVING THE DEATH PENALTY

APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT IMPOSING DEATH

MR. HALPRIN HAS AN OCTOBER 10, 2019 EXECUTION DATE

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APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT IMPOSING DEATH

Applicant Randy Halprin seeks relief from his conviction and judgment imposing death in violation of the United States Constitution.

INTRODUCTION

The Honorable Vickers Cunningham, the presiding judge at Mr. Halprin's capital trial, is a racist and anti-Semitic bigot who described Mr. Halprin as "that fuckin' Jew" and a "goddamn kike." That judge—who decided all pretrial motions, challenges during jury selection, and all objections during the taking of evidence—believed that Jews "needed to be shut down because they controlled all the money and all the power." He referred to Mr. Halprin's Latino co-defendants as "wetbacks."

In general, Judge Cunningham said about his service on the bench, "any 'nigger' or 'wetback' walking into his courtroom knew they were going to go down." Judge Cunningham's prejudices, bias, and animus towards Jews precluded him from the being the impartial judge the Due Process Clause of the Constitution requires. His central role in the trial from start to finish constitutes a structural defect, and requires that the judgment of conviction and sentence of death be vacated.

Anti-Semitic bias ranks as "humanity's greatest hatred," Dennis Prager & Joseph Telushkin, *Why the Jews?: The Reason for Antisemitism* 17 (1985), and Judge Cunningham's "statements reflect classic anti-Semitism." Anti-Defamation League ("ADL") Letter Brief in Support of Randy Halprin's Habeas Petition, *Halprin v. Davis*, Case No. 3:19-cv-01203-L (N.D. Tex. Jun. 19, 2019) (Exhibit 37) at 4. Judge Cunningham's participation in Mr. Halprin's trial despite his anti-Semitic animus offends basic concepts of fairness and religious equality and violates the Constitution's guarantee of due process of law. Like reliance on invidious racial stereotypes, a judge's religious animus represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

Just as a court must take extraordinary action to correct racial prejudice in the criminal justice system, it must act swiftly and decisively to remove the taint of anti-Semitic bias, or else risk the loss of public confidence in an impartial judiciary. *See*

Buck, 137 S. Ct. at 778; *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (A "criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him." (internal quotation marks and citation omitted)).

* * *

Mr. Halprin brings this application at the earliest opportunity. The *Dallas Morning News* first exposed Judge Cunningham's racism in an article published May 18, 2018. At that time, Mr. Halprin was appealing from the denial of his first federal habeas petition. *Halprin v. Davis*, No. 17-70026 (5th Cir.) (Exhibit 31). Although the newspaper did not reveal Judge Cunningham's anti-Semitic views or mention Mr. Halprin, counsel investigated and discovered evidence of the judge's specific bias. Mr. Halprin filed his judicial bias claim in federal court on May 17, 2019, in time to comply with the federal statute of limitations. *See* Motion to Stay and Abate Proceedings (Exhibit 32). He asked the federal court to immediately stay the federal proceedings so that he could file this application without running afoul of this Court's two-forums rule. *Id.* The State opposed that motion, asserting that it could predict with certainty that this Court would refuse to consider the claim. *See* Opposition to Motion to Stay Proceedings (Exhibit 33).

On June 5, 2019, the State moved the trial court to set Mr. Halprin's execution for October 10, 2019. State's Motion to Set Execution Date (Exhibit 34). Mr. Halprin

opposed the motion on grounds that the date conflicted with his efforts to present his claim to this Court, and the State misrepresented his previously stated position to the trial court. Opposition to State's Motion to Set Execution Date (Exhibit 35) at 1-2. Evidence in the form of emails and the State's representations to the federal court indicate the State sought the execution date in order to put pressure on this Court and the federal court. *Id.* at 2-6. On July 3, 2019, the trial court granted the State's motion and set the execution for October 10. On July 9, 2019, a warrant issued for Mr. Halprin's execution supported by the judgment of death signed and entered by the anti-Semitic, racist, biased Judge Vickers Cunningham.[1]

STATEMENT OF THE CASE

Mr. Halprin was convicted of capital murder and sentenced to death as a party in connection with the killing of Irving police officer Aubrey Hawkins in the course of a Christmas Eve robbery of a sporting goods store. Judge Vickers Cunningham presided over Mr. Halprin's trial and sentenced him to death.

I. The Crime for Which Mr. Halprin Was Convicted and Judge Vickers Cunningham's Appointment

In December 2000, Mr. Halprin and six other men participated in a notorious escape from the Connally Unit, a Texas Department of Criminal Justice ("TDCJ") prison, in Kenedy, Texas. The escape, Officer Hawkins's murder on Christmas Eve,

[1] Mr. Halprin also has a petition for writ of certiorari pending before the Supreme Court with respect to his initial federal habeas proceedings. *Halprin v. Davis*, No. 18-9676 (U.S.).

and the manhunt for the escapees—the so-called "Texas Seven"—drew extensive media coverage.

Even before his arrest, news stories began to document Mr. Halprin's Jewish identity in connection to the events. On January 7, the *Fort Worth Star-Telegram* reported that Mr. Halprin and another escapee, Michael Rodriguez, had applied to attend Jewish worship services less than a year before the escape, which "granted the privilege of worshipping with a rabbi." Miles Moffeit, *Chaplain: Escapees tricked guards; Senior minister says workers at Connally prison were beaten viciously, bound and locked up*, Ft. Worth Star-Telegram, Jan. 7, 2001 (Exhibit 1). A prison chaplain speculated Halprin and Rodriguez were "playing a game . . . of changing their faith so they could exploit worship for extra privileges" and doubted they were "really Jewish." *Id.*

The escapees were captured in a Colorado trailer park in late January 2001, where they had been impersonating devout Christian conventioneers. Michael Janofsky, *Texas Fugitives Fit In at Trailer Park, Neighbors Say*, N.Y. Times, Jan. 24, 2001 (Exhibit 2) ("They told people they were here to attend a religious convention," one neighbor said. "Whenever they would go outside to work on a vehicle, they would play religious music."). (One escapee took his own life before capture.)

Soon after his arrest, the *Dallas Morning News* reported that Mr. Halprin had recruited Rodriguez "because he was Jewish" when the two men attended Jewish

religious services at the Connally Unit. *See* Todd Bensman, *Rodriguez invited into plot for getaway car, Halprin says*, Dallas Morning News, Feb. 4, 2001 (Exhibit 3). The article also reported that Mr. Halprin had driven past his childhood synagogue when the escapees were passing through Arlington, Texas, and had spoken with a rabbi in the Colorado jail where he was being held. *Id.*

Early news reports also delved into Mr. Halprin's Jewish background. According to a January 2001 *Dallas Morning News* report,

> By early adolescence, the boy was flunking out of school and mapping sites where he thought space aliens would pick him up. Yet he also showed great ability on another front, mastering the lessons for his bar mitzvah at North Arlington's Congregation Beth Shalom synagogue.
>
> "Here's this kid reading Hebrew and leading the congregation and doing it well," said Chief Waybourn, who attended the coming-of-age ceremony.
>
> Mr. Halprin didn't stick with religious studies, said Janet Aaronson, the synagogue's executive director. The rabbi from that time "remembered that he was a bright kid," she said, "but a troubled kid."

Brook Egerton, *Halprin endured abuse, other hardships as youth*, Dallas Morning News, Jan. 14, 2001 (Exhibit 4).

Mr. Halprin's case, like those of the other members of the Texas Seven, was assigned to Judge Molly Francis of the 283rd Judicial District Court in Dallas. Judge Francis presided over the trial of the leader of the escape, George Rivas, who received a death sentence in August 2001.

Then, in September, in the middle of jury selection for Donald Newbury's trial, Governor Rick Perry appointed Judge Francis to fill a vacant seat on the Fifth District Court of Appeals in Dallas. *See* Press Release, Office of the Governor, *Governor Announces Appointment of Francis as a Justice of the 5th Court of Appeals*, Sept. 5, 2001 (Exhibit 5).

A month later, Governor Perry appointed Judge Vickers Cunningham to fill Judge Francis's seat on the 283rd District Court. *See* Press Release, Office of *Governor Appoints Cunningham as Judge, 283rd Judicial District*, Oct. 11, 2001 (Exhibit 6). From his appointment, Judge Cunningham knew his principal task would be overseeing the capital trials of the remaining members of the Texas Seven, including Mr. Halprin. Holly Becka, *New judge ready for escapees' trials; Appointee will take over death-penalty cases next month*, Dallas Morning News, Oct. 12, 2001 (Exhibit 7). He told a local magazine that he "wanted the challenge." *Two Woodrow Wilson grads help decide the Texas 7's fate*, Advocate: Lakewood/East Dallas, Aug. 1, 2002[2] (Exhibit 8).

Judge Cunningham was a Dallasite, born and bred. He was raised in the Lakewood neighborhood, and was a graduate of Dallas schools and Southern Methodist University. *Id.* His parents Bill "Bulldog" Cunningham and Mina Sue Cunningham were well-connected and active in Republican politics. *See* Declaration

[2] Available at: https://lakewood.advocatemag.com/2002/08/01/men-of-the-law/

of Tammy McKinney ¶ 2 (Exhibit 9) (describing church, country club, and social activities the Cunninghams were involved in); Rep. Jeb Hensarling, *Honoring the late Bill 'Bulldog' Cunningham*, The Constituent Register, May 16, 2016[3] (Exhibit 10) ("Bulldog was an active political volunteer, along with his wife, Mina.").

Judge Cunningham was a congregant and admirer of segregationist Pastor W. A. Criswell who led the church Cunningham attended and officiated at Cunningham's wedding. Jim Jones and Mary McKee, *Baptists eulogize Criswell ministry*, Ft. Worth Star-Telegram, Jan. 17, 2002 (Exhibit 11).

From a young age, Cunningham believed it was his "destiny" to serve as a judge. Exh. 8, *Two Wilson Grads*. He took his inspiration from the judges and prosecutors who lived in Lakewood, especially the long-serving Dallas District Attorney Henry Wade, Sr. Cunningham later explained, "I was Henry Wade's paperboy, and I went to school with his daughter . . . . I was so impressed with Henry Wade and his legend." Gromer Jeffers, *The late Henry Wade stirs emotions of DA candidates*, Dallas Morning News, Jan. 24, 2006 (Exhibit 12). After five years as a Dallas County prosecutor, Judge Cunningham was elected to a seat on the Dallas County Criminal Court in 1995, where he sat until his appointment to the district court. Exh. 7, Becka, *New judge ready for escapees' trials*.

[3] Available at: https://the-constituent.com/honoring-mr-bill-bulldog-cunningham-by-representative-jeb-hensarling/speech/69756

In the year and a half following his appointment, Judge Cunningham presided over the trials of Texas Seven defendants Donald Newbury, Michael Rodriguez, and Joseph Garcia, each of whom he sentenced to death. In that time, he also was elected to his district court seat in a contested election in November 2002. *See* Mark Donald, *Life After Lotto; Whatever Happened to the Dallas Public Defenders Who Won the Lottery?*, Texas Lawyer (online), July 19, 2004 (Exhibit 13) (describing 2002 election challenger King Solomon).

II. Mr. Halprin's Trial

Randy Halprin was the second to last defendant scheduled for trial. By June 2003, when the trial began, "the killing was pretty old news" and there were "far fewer reporters and spectators than in the earlier trials." Jacquielynn Floyd, *We Shouldn't Be Dulled to the Brutality*, Dallas Morning News, June 10, 2003 (Exhibit 14).

During the trial, Judge Cunningham presided over a portion of the questioning and selection of jurors, made critical pre-trial rulings, ruled on the admissibility of evidence relevant to Mr. Halprin's guilt and punishment, rejected a defense request for an anti-parties instruction, instructed the jury, and sentenced Mr. Halprin to death based on the jury's answers to the special issues.

Mr. Halprin was indicted and tried for capital murder under Texas's "law of parties," 1 CR 65, which meant the State did not need to prove that Mr. Halprin actually killed or intended to kill. Tex. Penal Code § 7.02. Under state law, the State

could only sentence Mr. Halprin to death if he "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2). As a result, in both phases of his trial, Mr. Halprin's relative culpability and credibility in explaining his role were central issues.

Mr. Halprin testified during the liability phase of trial that he played a minor role in the Oshman's robbery, did not want to carry a gun at all, did not shoot Officer Hawkins, or ever discharge his weapon during the robbery. 47 RR 98; 48 RR 24, 55, 102.[4] Mr. Halprin testified that during the escape, he did not physically strike anyone, 47 RR 99, had essentially no role in planning the escape, and played a minor role in the actual escape. 48 RR 4, 7. He said that after they escaped, the group robbed two other places before Oshman's, but he was only involved in one of those robberies, and did not carry a gun during that crime. 48 RR 8, 9. As to Oshman's, Mr. Halprin told the jury,

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[4] During his testimony, Mr. Halprin pleaded with Judge Cunningham:

> THE DEFENDANT: Your Honor can you please tell them to stop staring at me like that The DAs
>
> THE COURT: They're just listening to the testimony
>
> THE DEFENDANT: I understand but they're making strange faces and things like that and its making me uncomfortable and nervous.

47 RR 117-18. When the jury recessed, Judge Cunningham spoke sternly to Mr. Halprin: "Mr. Halprin, you put me in a very bad position. I don't really want to respond to your request in front of the jury. You should have waited until now." 47 RR 119-20.

> You know, I, before the robbery, I even told them, I'm not going to go in and carry a gun and there was a little argument and they made it very clear that, you know, it was, you know, their way or the highway. And so I told them I wasn't going to pull a gun and they said, fine, just gather clothes, grab a shopping cart, and gather clothes.

48 RR 14; *id.* at 136. When the shooting began, he "freaked out" and ran off. 48 RR 23.

The trial court repeatedly rebuffed Mr. Halprin's attempts to introduce a prison "ranking document" that rated the escapees' leadership qualities and showed Mr. Halprin "never exhibited leadership qualities," was "[v]ery submissive," and was the "weakest" of the members. *Halprin v. State*, 170 S.W.3d 111, 114-15 (Tex. Crim. App. 2005).

From its opening statement on, the prosecution tried to erase any distinction between Randy Halprin and the other escapees. *E.g.*, 41 RR 38 (referring to "their goal" and "their target").

Mr. Halprin's Jewish identity was a recurring subject during Mr. Halprin's trial. For example, when Mr. Halprin testified, he spoke about being "picked on" in prison because he was Jewish:

> [DEFENSE COUNSEL]: Q. Let me show you what has been marked as 954, which was the letter that was introduced by the State. And, once again, this is a letter you wrote; is that correct?
>
> [Halprin]: A. Yes, sir.
>
> Q. You wrote it to Dawn and in here it says - you talking about being in prison and being scared and in regard to the Blacks and the Mexicans and, "The just pick the jews [sic] to blame everything on.

> They never tried that crap with me. I had a lot of respect from one of the leaders of one of the Arian [sic] gangs over there named Batman who didn't really like me, so to speak, and I didn't like him. *He knew I didn't put up with that antisemitic* [sic] *crap.*
>
> So you might have been picked on because you were jewish [sic], but you at least tried to stand up for yourself being jewish [sic]?
>
> A. Yes, sir.

49 RR 46-47. Out of necessity Halprin formed alliances with Aryan Brotherhood gang members, but belonged to no gang. 49 RR 35-36.

The State argued at the close of the guilt phase that Mr. Halprin may not "look bad" but "you know he's deceitful" and "different than us," that he could not help but show his "true colors" and "true nature" when he testified. 50 RR 15.

In the punishment phase, the defense presented evidence that Mr. Halprin's life was shaped by his search for a Jewish identity and his desire to please his Jewish father. Mr. Halprin worked hard to become a worthy *bar mitzvah*, in an important Jewish rite of passage for adolescent boys. *See* 52 RR 9-11 (Mindi Sternblitz); 52 RR 53-55 (Terri Goldberg). The defense called as witnesses Mr. Halprin's childhood friends, who themselves identified as Jewish. This evidence supported Mr. Halprin's plea for the jury to find "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment" in his "character or background." *See* Tex. Code Crim. Proc. art. 37.071 § 2(e).

The State, in turn, elicited the fact that Mr. Halprin professed to "hat[ing] Christians with a passion" and "despising everything dealing with Jesus" after he was shipped off to a Christian boarding school in middle school:

> Q. Looking at this exhibit again, do you remember him telling you that, "I think boarding school messed Wesley and I both up. You know, after I was locked up, I really started to hate Christians, I mean with a passion. I guess I blamed a lot of things on that school at first, so I just ended up despising everything dealing with Jesus. I'm not that way, now, though I still don't trust many Christians these days, either."
>
> Did you ever talk to him about that?
>
> A. Not specifically that statement. I know that you know he was raised being Jewish and then all of a sudden he was having to attend these religious services that is contradicting you know what he was raised this whole time. So I can understand that animosity was built up.

52 RR 28 (quoting SX 975 (Letter from Randy Halprin to Mindi Sternblitz, Oct. 4, 2001)).

In a critical ruling, Judge Cunningham denied Mr. Halprin the ability to present mitigating evidence gathered by clinical psychologist Dr. Kelly Goodness. Judge Cunningham held a hearing prior to Dr. Goodness's testimony. 52 RR 88. The State objected to the doctor's report and to the doctor testifying as to hearsay used in forming her opinion. 53 RR 3. The State argued that, pursuant to Texas Rule of Evidence 705, it was "highly prejudicial and unfair to the State" to allow the testimony. 53 RR 3. According to the State, Mr. Halprin had to show that the hearsay statements were "otherwise admissible in court" before they could be elicited from the witness, "[i]f they are not, then it's within this Court's discretion

to exclude them." 53 RR 5. Judge Cunningham ruled that Dr. Goodness could testify to her opinion and the sources she used to form that opinion, but could not testify to any specific information contained within those sources. 53 RR 6; 8; 11-12. In rote application of the hearsay rule, the court excluded all details underlying Dr. Goodness's opinions including her conclusion that Mr. Halprin's biological parents were drug addicts, 53 RR 30, and an explanation of his expulsion from boarding school, 53 RR 39.

Judge Cunningham also denied Mr. Halprin's motion challenging the constitutionality of the special "law of parties" instruction for the punishment phase as applied to his case. 1 CR 158-171 (arguing Tex. Code Crim. Proc. art. 37.071, § 2(b)(2) fails to satisfy Supreme Court precedent). At the close of the evidence, Mr. Halprin's counsel renewed his previous motions, including those attacking § 2(b)(2). 53 RR 73.

At the close of the punishment phase, the prosecution argued that Mr. Halprin was a "liar" who "manipulates people," and who was "trying to manipulate one or two of you, hopefully." 53 RR 83. The State went on to argue that Mr. Halprin "uses people," and "blames people." 53 RR 84. The prosecution attacked Mr. Halprin's assertion and testimony that he was not really a member of this "gang," arguing that he "was not just being drug along or anything." 53 RR 127. The prosecution repeatedly grouped the all of the escapees' actions and intent together, and attributed "their"

actions and intent specifically to Mr. Halprin. 53 RR 126-128; 135-136; 139. The State contended that Randy Halprin was "as actively involved as the others." 53 RR 128. The State directly challenged Mr. Halprin's assertion that "he wants to present himself as the follower, the person who doesn't want to be there, that's reluctant, that doesn't want to go along." 53 RR 128. "He tries to distance himself. I was a follower. I didn't want to be there. That they had to have someone watch me. Don't buy it for a second, folks. He was in it all the way." 53 RR 133. The prosecution triumphantly proclaimed in the absence of excluded evidence that there was no "significant mitigating evidence." 53 RR 138.

During its six hours of deliberations over the appropriate punishment, the jury indicated through a note that its answer to the second special issue turned on the difference between whether Mr. Halprin "'anticipated that a human life would be taken' and 'should have anticipated.'" 1 CR 45. Up to that point, this was the longest time any Texas Seven jury had deliberated. *See* Robert Tharp, *Jury in escapee trial is still out; Panel sequestered after 5 hours, no agreement on killer's punishment*, Dallas Morning News, June 12, 2003 (Exhibit 15). The record does not memorialize how the trial court responded to the note.

III. Judge Cunningham's Extensive History of Prejudice on the Basis of Religion, Race, Ethnicity, and Sexuality

Before, during, and after Randy Halprin's trial, Judge Cunningham harbored deep-seated animus towards and prejudices about non-white, non-Christian people.

He expressed these views frequently in private and they informed his thinking about his public service in the law.

Tammy McKinney grew up with Vic Cunningham and knew him intimately. Cunningham and McKinney's parents were close friends, ran in the same social circles, went to the same church, and were members of the same clubs. *See* Exh. 9, McKinney Decl. ¶¶ 2-5. McKinney and Cunningham were friendly and "Vic really trusted" McKinney. *Id.* ¶ 6. When he became a judge, Cunningham even offered McKinney the position of court coordinator. *Id.*

But Judge Cunningham's bigotry prevented McKinney and Vic from ever becoming "truly good friends." *Id.* ¶ 8. Cunningham "did not like anyone not of his race, religion or creed, and he was very vocal about his disapproval." *Id.* For example, Cunningham belittled his brother Bill by calling him "nigger Bill" "for as long as [McKinney] can remember." *Id.* ¶ 16. He was "always []like this," but "his level of hatred" seemed to grow with age. *Id.* ¶ 8. By the time McKinney and Cunningham were around thirty—long before Judge Cunningham presided over Mr. Halprin's trial—McKinney found Cunningham "so hateful." *Id.* ¶ 5. She remembers that "[h]e would regularly use offensive" language "such as 'nigger,' 'wetback,' 'spic,' 'kike,' 'the fuckin' Jews.'" *Id.*

Judge Cunningham "would often use race or ethnicity to refer to people . . . who were members of groups he did not like. . . . If someone were actually African-

American, he would call them 'Nigger' and their first name. It was his signature way of talking about people of color. For Jewish people, he would say a 'fuckin' Jew' or a 'goddamn kike.'" *Id.* ¶ 16.

After the Texas Seven trials, Judge Cunningham would "tout with pride his role." *Id.* ¶ 7. When he discussed the cases, he would "often" make "extremely hateful comments" and always mention the defendants' "race, ethnicity or religion." *Id.* According to McKinney, Judge Cunningham "took special pride in the death sentences because they included Latinos and a Jew." *Id.* Judge Cunningham would call Mr. Halprin a "goddamn kike" and "that fuckin' Jew." *Id.* ¶ 13. He also used the term "'wetback' to describe some of the Texas 7 defendants." *Id.* ¶ 8. On at least one occasion, McKinney remembers Cunningham saying, "From the wetback to the Jew, they knew they were going to die." *Id.* ¶ 12. When Judge Cunningham "los[t] inhibitions" and aired his prejudices at parties, he would often return to discussing the Texas Seven. *Id.* ¶ 8. Speaking of his judgeship, "Vic said any 'nigger' or 'wetback' walking into his courtroom knew they were going to go down." *Id.* ¶ 12.

IV. Judge Cunningham's 2006 Campaign for District Attorney

In late 2005, Judge Cunningham resigned his judicial seat in order to run for Dallas district attorney in the Republican primary. Publicly, Judge Cunningham ran as an efficient administrator, who was tough but fair. *See* Exh. 9, McKinney Decl. ¶ 12; Editorial, *Dallas District Attorney: Cunningham offers GOP a breath of fresh air*,

Dallas Morning News, Jan. 21, 2006 (Exhibit 16) (editorial board endorsement of Judge Cunningham for "administrative skill" and experience as prosecutor and judge). Privately, Judge Cunningham "said that he was running for DA so that he could return Dallas to a Henry-Wade style of justice where we did not have to worry about 'niggers,' Jews, 'wetbacks,' and Catholics." Declaration of Amanda Tackett ¶ 7 (Exhibit 17); Exh. 9, McKinney Decl. ¶ 10 (Cunningham said "he wanted to run for office so that he could save Dallas from 'niggers,' 'wetbacks,' Jews, and dirty Catholics"). He said, "My job is to prevent niggers from running wild again." Exh. 17, Tackett Decl. ¶ 13.

Dallas District Attorney Henry Wade's office had become publicly notorious for its institutional practice of discrimination in jury selection. The Supreme Court recognized that at least until 1976 (and likely into the mid-1980s), "the District Attorney's Office had adopted a formal policy to exclude minorities from jury service." *Miller-El v. Cockrell*, 537 U.S. 322, 334-35 (2003). A policy document instructed prosecutors: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Id.* at 335.

One of Judge Cunningham's Republican-primary opponents suggested Cunningham carried the same "racial baggage" from Wade's tenure. Gromer Jeffers, *DA race reflects changing county: Gradual uptick in Democratic support alters campaign tactics*, Dallas Morning News, Feb. 12, 2006 (Exhibit 18). As a Dallas prosecutor, Cunningham had intentionally removed all black prospective jurors

during jury selection for a 1992 murder trial. *Id.* Judge Cunningham acknowledged what he had done, but defended the strikes by claiming it was the prospective jurors' Democratic party affiliation, not their race, that triggered the strikes. *Id.*

During the 2006 campaign, Judge Cunningham continued to tout his role in sentencing the Texas Seven to death. A campaign advertisement at that time described how Judge Cunningham had "looked each of the Texas 7 in the eye when he sentenced them to death."[5] Judge Cunningham privately confided that he believed God had chosen him to preside over those trials and that he was "entitled to be" the district attorney because he had presided over the Texas Seven trials. Exh. 17, Tackett Decl. ¶ 6.

In the campaign office and at campaign events, Judge Cunningham resorted to the same bigoted statements that McKinney heard him make his entire life. *Id.* ¶ 9. This was news to campaign volunteer Amanda Tackett, who was enlisted to help by her friend and Judge Cunningham's brother and campaign manager Bill Cunningham. *Id.* ¶ 5. Tackett personally heard Vic refer to Mexicans as "wetbacks," Catholics as "idol-worshippers," Jews as "dirty," and African-Americans as "niggers." *Id.* ¶ 9.

Like McKinney, Tackett heard Judge Cunningham discuss the Texas Seven cases using racial and religious epithets. At a Lakewood campaign event, Tackett

[5] *Pleeeeaaaazzzze*, Liberally Lean from the Land of Dairy Queen, Feb. 21, 2006, www.liberallylean.com/2006/02/pleeeeaaaazzzze (Exhibit 29).

recalls hearing Cunningham refer to Mr. Halprin as "the Jew" and others in the Texas 7 as "wetbacks." *Id.* ¶ 15. Cunningham "then launched into his campaign speech about immigration and the importance of White people in the Dallas community." *Id.*

Discussing criminal cases in Dallas, Judge Cunningham would use the phrase "T.N.D."—that is, "typical nigger deals"—as "shorthand for criminal cases involving African-Americans":

> The term referred to the system of justice African-Americans were subjected to. Vic routinely used the phrase "TND" to describe the goings-on around the courthouse. It was a no muss no fuss type of justice. If a case involved a Black person, he'd say, "It's just a nigger doing what niggers do." There was a more extreme connotation when a White was assaulted or killed by a Black.

Id. ¶ 11.

On the topic of investigations into wrongful convictions by renowned defense attorney Barry Scheck, Cunningham privately complained that the "'filthy Jew' . . . was going to come in and free all these 'niggers.'" *Id.* ¶ 13.[6] Judge Cunningham believed

[6] Barry Scheck, co-founder of the Innocence Project, was interviewed on the PBS program "Frontline" regarding his organization's role in several DNA exonerations in Texas. Transcript, *Burden of Innocence*, https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/script.html (last visited May 17, 2019). The episode aired on May 1, 2003, a month before Mr. Halprin's trial.

Between the years 2001 and 2006, 10 men convicted in Dallas County were exonerated as a result of DNA testing. *Tenth Dallas County Man in Just Years Is Proven Innocent Through DNA Evidence*, Innocence Project, https://www.innocenceproject.org/tenth-dallas-county-man-in-just-five-years-is-proven-innocent-through-dna-evidence-larry-fuller-set-to-be-released-today/ (last visited May 17, 2019). Since the formation of the Conviction Integrity Unity within the Dallas County District Attorney's Office, 28 Dallas County convictions have been overturned on the basis of DNA evidence. The National Registry of Exonerations,

the convicted men "should not have the benefit of DNA testing" because "the cases were all TNDs anyhow" and "they are all on death row for a reason." *Id.*

Judge Cunningham also confidentially expressed racial and religious stereotypes about black and Jewish donors and lawyers, even as he publicly courted their contributions and endorsements. Judge Cunningham conceded that "some Jews were good attorneys," but "as far as Jews in general, they needed to be shut down because they controlled all the money and all the power." *Id.* ¶ 9. He referred to Democratic nominee and eventual Dallas district attorney Craig Watkins as "nigger Watkins." *Id.* ¶ 19. Judge Cunningham put on what he called his "nigger tie" when going to a campaign event at a charitable foundation run by African-Americans. *Id.* ¶14.

Judge Cunningham's own mother believed that her son's "biggest burden was his bigotry," Exh. 9, McKinney Decl. ¶ 17, and it would be his "downfall," Exh. 17, Tackett Decl. ¶ 17. Judge Cunningham lost the Republican primary.

Between 2006 and 2018, Judge Cunningham did not seek elected office. His views did not appear to change, however. In 2008 or 2009, Tackett remembers Judge Cunningham wearing a stereotypical banker's outfit—green visor and suspenders—and

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http://www.law.umich.edu/special/exoneration ("search database for 'Texas' 'Dallas County'") (last visited May 17, 2019).

declaring that he would be her "Jew banker" at a casino-themed party. Exh. 17 Tackett Decl. ¶ 21.

McKinney and Tackett both were aware of a 2014 incident in which Judge Cunningham "interfered with his daughter's . . . relationship with a young Jewish man she dated when she was in college at Texas A&M." Exh. 9, McKinney Decl. ¶ 14; Exh. 17, Tackett Decl. ¶ 21. Tackett recalls Cunningham instructing his daughter to break up with "that Jew boy" when referring to her then-boyfriend. Exh. 17, Tackett Decl. ¶ 21.

That Jewish young man, Michael Samuels, confirmed the incident. *See* Declaration of Michael Samuels (Exhibit 19). He confirmed that he dated Cunningham's daughter Suzy for about two and a half years. He tried to meet Cunningham several times when he returned to Texas, but Cunningham "never made an effort to meet me." *Id.* ¶ 2. Suzy often said that her father was "very opinionated." *Id.* Samuels "began to understand that [Cunningham] did not want to meet with [him] because [he is] Jewish." *Id.* Suzy abruptly and unexpectedly broke up with Samuels in 2014. She eventually explained "that her father did not like [Samuels] because [he] was Jewish" and her father threatened not to pay for her law school tuition unless she broke up with Samuels. *Id.* ¶ 3. Samuels's uncle posted on Facebook about the incident and relayed the same information to McKinney. *Id.* ¶ 14.

V. Judge Cunningham's 2018 Campaign for County Commissioner and the May 18, 2018 *Dallas Morning News Expose*

In 2018, Vickers Cunningham again sought office, this time as a county commissioner. Still running as "Judge Cunningham," and still citing the fact that he had "presided over the 'Texas 7' capital murder death penalty trials," he bragged that he "has put more criminals on Death Row than almost any judge in the nation." *See* "You Know Judge Vic (Ret.)," Judge Vic for Commissioner, http://judgevicforcommissioner.com/about/ (cached May 23, 2018) (Exhibit 20).[7]

Cunningham made it to a run-off election for the Republican nomination. Less than one week before the run-off, the *Dallas Morning News* issued a lengthy story about Judge Cunningham's racism. Naomi Martin, *White, straight, and Christian: Dallas County candidate admits rewarding his kids if they marry within race*, Dallas Morning News, May 18, 2018[8] (Exhibit 21). In a videotaped interview for the piece—an excerpt of which was posted with the article (*see* Exhibit 22, video capture of interview on compact disc)—Cunningham revealed his racially prejudiced attitudes. *Id.* Cunningham acknowledged that he had created a living trust for his children that withheld distributions if they opted to marry a nonwhite, non-Christian person.

[7] The website has since been taken down.

[8] Available at: https://www.dallasnews.com/news/dallascounty/2018/05/18/marry-white-straight-christian-dallas-county-politician-admits-rewarding-kids-within-traditional-family-values

Cunningham explained he was motivated by "my faith of being a Christian"; he "wanted to support my faith" and "traditional family values." *Id.*

Beyond exposing Cunningham's creation of an anti-miscegenation trust fund for his children, the *Dallas Morning News* also reported that people close to Cunningham—including his mother, brother, and a former political aide—knew him to be "a longtime bigot." *Id.*

The article reported, "the former judge repeatedly use[d] the N-word to insult black people behind their backs" and "described criminal cases involving black people as T.N.D.s, short for Typical [N-word] Deals.'" *Id.* The story reported Amanda Tackett's account of another racist incident when Cunningham in 2010 or 2011, had said of "former District Attorney Craig Watkins, who is black, [and] had helped secure exonerations of wrongly convicted men: 'Did you see what [N-word] Watkins is doing, setting all those [N-words] free?'" *Id.* Cunningham continued, "'He'll never lose an election because all the [N-words] want their baby daddy out of jail.'" *Id.* Tackett summarized: "Vic believes on some level all black people have done something that warrants putting them in jail." *Id.* When asked about his use of the word "nigger," "Cunningham paused for nine seconds. He asked if the question referred to using the word in court. Told the question referred to use in everyday life, he then said no." *Id.* Cunningham's brother, Bill, reported that Cunningham routinely referred to Bill's husband, a black man, as "your boy," and refused Bill's husband entry into his home.

Exh. 22, Martin, *White, straight and Christian.* Additionally, Bill Cunningham confirmed that Vic called him "[N-word] Bill" his entire life. *Id.* Meanwhile, a text message authored by Cunningham's son further revealed that Cunningham's racial bigotry extended not only to African-Americans, but to nonwhite people in general:

> I am making my father except [sic] interracial relationships starting with me and my relationship with my Vietnamese girlfriend. It's a slow process but [] i have faith in him turning around. And if he doesn't he will have one less person at his dinner table.

Id.

Confronted with the evidence and allegations pointing to his racist attitudes, Cunningham denied their veracity. *Id.* And although "[a]s a judge in [Dallas] county for 10 years, he sent scores of black and Hispanic people to prison," Cunningham claimed that "his views on his children marrying outside their race never translated into unfairness on the bench or discrimination in any way." *Id.*

The *Morning News* story was shared widely and garnered national attention. It provoked responses on social media, including a tweet from longtime Lakewood resident Kyle Raines who wrote that he heard Judge Cunningham say the N-word when the judge "used it very malevolently against a black friend of mine." Exhibit 36. The *Dallas Morning News* editorial page retracted their endorsement. Editorial, *We withdraw Vickers Cunningham recommendation in GOP runoff for Dallas County Commissioners Court Precinct 2,* Dallas Morning News, May 19, 2018 (Exhibit 23). The local Republican party condemned his statements. Naomi Martin, *Dallas County*

GOP slams one of its own candidates for alleged 'racist language and behavior,' Dallas Morning News, May 19, 2018 (Exhibit 24).

Judge Cunningham took to his campaign website to post a "personal note from Vic Cunningham." "A Personal Note from Judge Vic Cunningham," http://judgevicforcommissioner.com/about/ (cached May 23, 2018) (Exhibit 25). The judge admitted he set up the trust and stated that his "views on interracial marriage have evolved since [he] set-up the irrevocable trust in 2010." *Id.* He categorically denied ever using the word "nigger," attacked his brother's motives, and pointed out that Tackett's story was "without collaboration [sic: corroboration]." *Id.* Judge Cunningham lost the run-off election by 25 votes. Naomi Martin, *Dallas candidate who promised to reward kids for marrying white loses by 25 votes*, Dallas Morning News, May 22, 2018 (Exhibit 26).

VI. Procedural History

Mr. Halprin pleaded not guilty to a charge of capital murder entered in the 283rd District Court, Dallas County, Texas in Cause No. F01-00327-T. Following a jury trial before Judge Vickers Cunningham, the jury found Mr. Halprin guilty on June 9, and returned a sentence of death on June 12, 2003.

Mr. Halprin had an automatic appeal to the Texas Court of Criminal Appeals ("TCCA") in Cause No. AP-74,721. The TCCA affirmed on June 29, 2005. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005). On appeal, Mr. Halprin raised

nineteen points of error.[9] *Id.* Mr. Halprin did not seek a writ of certiorari from the Supreme Court of the United States.

On April 6, 2005, Mr. Halprin timely filed an application for writ of habeas corpus in the TCCA which was given Cause No. WR-77-174-01. As described above, in late 2005, Judge Cunningham resigned his judicial seat in order to run for Dallas District Attorney in the Republican primary. After two changes of presiding judge, the trial court adopted the State's proposed findings of fact and conclusions of law with minimal alterations. This Court then adopted the trial court's findings and conclusions and denied relief on March 20, 2013. *Ex parte Halprin*, 2013 WL 1150018. In his application, Mr. Halprin raised thirty-one allegations challenging his conviction and sentence. *Id.* at *1.

On March 20, 2014, Mr. Halprin filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in federal court. *Halprin v. Davis*, 3:13-cv-01535-L (N.D. Tex.). On September 27, 2017, the federal district court issued a memorandum opinion and order denying relief, and a judgment which dismissed Mr. Halprin's petition with prejudice. *Halprin v. Davis*, 2017 WL 4286042 (Sept. 27, 2017 N.D. Tex.).

[9] Mr. Halprin raised two points of error related to the trial court's exclusion of mitigation evidence; ten points of error regarding the trial court's rulings during jury selection from the primary panel; three points of error regarding the trial court's rulings during the alternate jury selection process; and four points of error related to the prosecution's questioning during jury selection. *Halprin v. State*, 170 S.W.3d at 113-18.

The United States Court of Appeals for the Fifth Circuit denied Mr. Halprin's request to certify an appeal of his claims. *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018).

On June 12, 2019, Mr. Halprin filed a petition for writ of certiorari with the Supreme Court of the United States. *See Halprin v. Davis*, No. 18-9676 (U.S.).

On May 17, 2019, Mr. Halprin filed a federal habeas petition in the United States District Court for the Northern District of Texas raising the same judicial bias claim he raises here. *Halprin v. Davis*, Nos. 3:13-cv-1535-L; 3:19-cv-1203-L. He has since asked the federal district court to stay its proceedings to allow him to return to state court to exhaust this claim. *Id.*

Fully aware of Mr. Halprin's federal litigation, the State sought an order from the trial court setting an execution date for Mr. Halprin on June 6, 2019. Over Mr. Halprin's objections and request for a hearing on the State's motion, and without regard for the pending federal litigation in both the federal district court and the Supreme Court, the trial court entered an order on July 3, 2019, setting Mr. Halprin's execution date for October 10, 2019.

CLAIMS FOR RELIEF

CLAIM I TRIAL JUDGE VICKERS CUNNINGHAM'S BIAS AGAINST DEFENDANT RANDY HALPRIN BECAUSE HE IS JEWISH VIOLATED MR. HALPRIN'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF HIS RELIGION AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

I. Governing Law

The United States Constitution forbids the participation of a judge in a criminal trial who harbors an actual bias or an objectively intolerable risk of bias at trial. Due process of law, as guaranteed by the Fourteenth Amendment, requires "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV. Texas law is similar. *See* Tex. Const. art. 1, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."); Tex. Const. art. 1, § 1 ("Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.").

Objectively Intolerable Risk of Bias. The constitutional right to an impartial judge does not merely require the "absence of actual bias." *Murchison*, 349 U.S. at 136. "[O]ur system of law has always endeavored to prevent even the probability of unfairness," because "justice must satisfy the appearance of justice." *Id.* Any "possible

temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." .

Thus, a judge's participation in a criminal trial offends due process when an objective observer, "considering all the circumstances alleged," would conclude "the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009))).

Each time the Supreme Court has considered a case raising an unconstitutional risk of bias, its finding was based on evidence other than the judge's rulings in the case. *Rippo*, 137 S. Ct. at 906-07 (source of potential bias was district attorney investigating judge for bribery during defendant's trial); *Williams*, 136 S. Ct. at 1906-07 (Constitution requires recusal "where a judge had a direct, personal role in the defendant's prosecution"); *Caperton*, 556 U.S. at 884 ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."); *Murchison*, 349 U.S.

at 137 (finding due process does not "permit[] a judge to act as a grand jury and then try the very persons accused as a result of his investigations"); *Tumey*, 273 U.S. at 532-34 (finding due process violated where judge had small pecuniary interest in case and could raise funds for his community—and improve his electoral position—by imposing higher fines).

Structural Error. The violation of a defendant's right to a fair tribunal is a structural constitutional error and so is not subject to harmless error review. *Tumey*, 273 U.S. at 535.[10] That is because a biased judge presiding over a criminal trial is a basic defect in the "whole adjudicatory framework." *Williams*, 136 S. Ct. at 1902. It is impossible to catalog the many ways a biased trial judge may have affected the proceedings: "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Because Mr. Halprin raises a claim of structural error that "cause[d] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process," prejudice is presumed. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017).

[10] *See also Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996) ("The Supreme Court has recognized the following as examples of structural error: total deprivation of counsel at trial, *a biased judge*, the unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.") (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991)) (emphasis added).

Moreover, a reviewing court may not be able to detect a biased judge's influence. Courts "cannot review a trial transcript to determine whether the presiding judge, despite his actual bias, was fair: 'The record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which, as well as his statements and rulings of record, might have adversely influenced the jury and affected its verdict.'" *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) (quoting *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976)). A judge's "lightest word or intimation is received [by jurors] with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). Therefore, a "'criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him.'" *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (quoting *Edwards v. Balisok*, 520 U.S. 641, 647 (1997)).

Nature of the Bias. The judge's bias was more direct and more pernicious than in cases where the Supreme Court found a violation of due process.

The Court has found a judge's participation unconstitutional where he had "earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case." *Williams*, 136 S. Ct. at 1910 (judge authorized decision to seek death sentence); *see also Murchison*, 349 U.S. at 134 (judge may not serve as both a "one-man grand jury" and as the trier of contempt charges that he initiated). And the Constitution forbids a judge from presiding over a criminal trial where she has a slight

financial interest in the outcome of the case. *See Tumey*, 273 U.S. at 520 (mayor-judge received a salary supplement only for convictions); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (similar); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986) (disqualification required where state supreme court justice was plaintiff in almost identical insurance case in lower state court). Disqualification may also be constitutionally necessary as a result of events involving judicial elections, where a litigant's campaign contributions have a "significant and disproportionate influence" in placing a judge on a specific case. *Caperton*, 556 U.S. at 884, 887. As with all these circumstances, a judge's religious and racial bias makes it intolerably likely that a defendant—who is a member of the disfavored race or religion—will be tried by a court "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

When a judge expresses religious and racial bias and presides over a *capital* trial, it represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). As the Texas Supreme Court stated 130 years ago, "Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black is a matter of indifference." *Moss v. Sanger*, 12 S.W. 619, 620 (Tex. 1889) (reversing civil judgment where attorney made derogatory remarks about Jewish party).

The "basic premise" not to punish people for *who they are* finds expression not just in the Constitution's guarantee of a fair tribunal, but in other fundamental constitutional rights, protecting religious liberty and equal protection under the law. *See* U.S. Const. amend. I, XIV.

"The clearest command of the Establishment Clause is that one religious denomination"—or one religion—"cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). It follows that judges, as state actors, may not "denigrate . . . religious minorities" through their practices. *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014). The Free Exercise Clause likewise preserves religious conscience from state persecution. It "protects against governmental hostility which is masked, as well as overt," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), and outlaws even "'subtle departures from neutrality' on matters of religion," *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540).

The Equal Protection Clause provides yet another mandate to root out religious, racial, and ethnic prejudice.[11] The Fourteenth Amendment reflects an "imperative to purge racial prejudice from the administration of justice." *Pena-*

[11] Hatred of Jews has sometimes been characterized as a racial or ethnic prejudice, not only a religious one. *See* Prager & Telushkin, *Why the Jews?* 151-154 (discussing Nazi anti-Semitic racism). In discussing prejudice against Latinos, the Supreme Court has used both the language of race and of ethnicity. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 863 (2017).

Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017). Racial bias differs in kind from other forms of bias like a pro-defendant bias or a relationship to a witness. *Id.* Racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* For this reason, the Court mandated a constitutional exception to a well-established state rule barring impeachment of jurors with their statements at least "where a juror made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 869.

In *Buck v. Davis*, Chief Justice Roberts condemned even the slightest injection of racial stereotypes into a capital trial. 137 S. Ct. at 778. Explicit racial stereotypes were "toxi[c]"—"deadly [even] in small doses." *Id.* at 777. The toxin poisons not just the defendant's trial, but "'poisons public confidence' in the judicial process," and undermines the legitimacy of "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Id.* at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), and *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

Equal administration of justice for religious minorities is no less important. "The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment); *see also Murphy v. Collier*, No.

18A985, 2019 WL 2078111, at *2 (U.S. May 13, 2019) (statement of Kavanaugh, J., joined by Roberts, C.J., respecting grant of application for stay of execution) (discussing "the Constitution's guarantee of religious equality").

In sum, a judge's religious and racial prejudices are uniquely offensive to the Constitution and the legitimacy of the criminal justice system. Even the slightest influence of racial and religious stereotypes will make a trial fundamentally unfair.[12] A right to a trial free from a judge's religious and racial bias secures these fundamental principles of equality and religious liberty.

Finally, the Eighth Amendment demands especially stringent review of a judge's impartiality in a death-penalty trial. As the D.C. Circuit recently observed in vacating three years' of capital proceedings before a biased Guantanamo military commission: "in no proceeding is the need for an impartial judge more acute than one that may end in death." *In re Al-Nashiri*, 921 F.3d 224, 231 (D.C. Cir. 2019); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) ("[T]he [Supreme] Court has been particularly sensitive to ensure that every safeguard is observed."). From jury selection through the penalty-phase verdict, proceedings in a capital case are structured to culminate in an individualized assessment of the defendant and his crime.

[12] *See also United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (when an extrajudicial bias or prejudice is "somehow related to a suspect or invidious motive," "only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.").

> [A]s *Woodson v. North Carolina*, 428 U.S. 280 (1976), made clear, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (plurality opinion).

Penry v. Lynaugh, 392 U.S. 302, 316 (1989).

Capital cases raise the greatest possible risk that a judge's "lightest word or intimation [could be] received [by jurors] with deference, and may prove controlling." *Starr*, 153 U.S. at 626. A judge's deep-seated beliefs in insidious group-based stereotypes is anathema to this cornerstone Eighth Amendment precept.

II. Judge Cunningham's Animus Against Randy Halprin as a Jewish Person Introduced an Objectively Intolerable Risk of Bias Into Mr. Halprin's Capital Trial

Judge Vickers Cunningham's anti-Semitic prejudice against Mr. Halprin violated Mr. Halprin's right to a fair trial in a fair tribunal.

A. JUDGE CUNNINGHAM'S PREJUDICED COMMENTS ABOUT MR. HALPRIN

According to two independent sources, Vickers Cunningham referred to Mr. Halprin using hateful epithets when discussing his case. *See* Exh. 9, McKinney Decl. ¶ 7 (calling Mr. Halprin "fucking Jew"); *id.* at ¶ 13 (calling Mr. Halprin "that fuckin' Jew" and "goddamn kike"); Exh. 17, Tackett Decl. ¶ 15. When he spoke about his role in the Texas Seven cases, he "took special pride in the death sentences because they included Latinos and a Jew." Exh. 9, McKinney Decl. ¶ 7. McKinney remembers

Cunningham saying, "From the wetback to the Jew, they knew they were going to die." *Id.* ¶ 12.

These statements disclose far more than an unmistakable bias against Jewish people generally. The statements evince a specific animus against Mr. Halprin because of his Jewish identity, and indicate that Judge Cunningham took satisfaction from his role in Mr. Halprin's death sentence *because* he is a "fucking Jew" and a "goddamn kike." *Cf. Moss*, 12 S.W. at 620 ("Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black is a matter of indifference."); *Buck*, 137 S. Ct. at 778 ("Our law punishes people for what they do, not who they are.").

Judge Cunningham's use of ethnic and religious slurs to describe Mr. Halprin and his Latino co-defendants is direct evidence of his animus. Judge Cunningham's statements about Mr. Halprin "reflect classic anti-Semitism." Exh. 37, ADL Letter-Brief at 4. "[R]outine use of racial slurs constitutes direct evidence that racial animus was a motivating factor" for the decision-maker. *Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) (use of "nigger" was direct evidence of employer's discrimination in Title VII case). The terms "the Jew," "fucking Jew," and "goddamn kike"—all of which Judge Cunningham called Mr. Halprin—are slurs.

The term "wetback" is another ethnic slur. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993); *Ex parte Guzmon*, 730 S.W.2d 724, 733 (Tex.

Crim. App. 1987) (counsel's repeated use of slur in death-penalty trial to describe defendant was "particularly harmful" because it exacerbated the jury's "doubts that such an illegal alien was entitled to all the protections United States citizens are afforded").[13]

The term "*the* Jew" is pejorative as Judge Cunningham used it. As Professor Bryan Stone explains, the use of the term "the Jew" has a long historical lineage and, when applied to an individual, "diminishes the individuality and humanity of a single person by attaching to them the perceived attributes of the group of which they are a member." Report of Professor Brian Stone, Ph.D.[14] at 18 (Exhibit 27). This suggests to the listener that "the individual has no qualities other than those shared with the mass, that they are nothing more than the class they are a part of." *Id.* The term reduces the individual to "their supposedly debased inherited traits." *Id.*

Judge Cunningham's use of "the Jew" as pejorative is an issue about which "there can be no doubt." Exh. 37, ADL Letter-Brief at 4. "The longstanding opprobrium that Jews faced throughout history caused the term 'Jew' ... to accrue

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[13] For summaries of the history of the term and the injury it causes, see Marisa Gerber, For Latinos, a Spanish Word Loaded with Meaning, L.A. Times (Apr. 1, 2013), http://articles.latimes.com/2013/apr/01/local/la-me-latino-labels-20130402; Gregory Korte, Mexican Slur Has Long History in American Politics, USA Today (Mar. 29, 2013, 6:30 PM), http://www.usatoday.com/story/news/politics/2013/03/29/mexican-immigration-slurhistory/2036329/.

[14] Bryan Stone is Professor of History at Del Mar College in Corpus Christi, Texas, and the author or editor of two books about Texas Jews, including *The Chosen Folks: Jews on the Frontiers of Texas* (2010), the first scholarly narrative history of the Texas-Jewish community. *See* Exh. 27, Stone Report at 2 (credentials); Curriculum Vitae, Bryan Stone (Exhibit 28).

some anti-Semitic connotations." *Id.* Judge Cunningham's use is consistent with his anti-Semitic mindset about Jewish people and his pattern of anti-Semitic epithets. For example, Ms. Tackett recalls Judge Cunningham wearing a stereotypical banker's outfit and declare that he would be her "Jew banker" at a casino-themed party. Exh. 17, Tackett Decl. ¶ 21. The phrase invokes the anti-Semitic character Shylock from Shakespeare's *Merchant of Venice* and other pejoratives like "*to jew, to jew down, jewed*, or *jewing*—meaning to bargain with, haggle, or cheat—[and] derives from ancient canards about Jewish corruption and greed." Exh. 27, Stone Rpt. at 17. Professor Stone, quoting the *Dictionary of Jewish Usage*, writes, "As an adjective . . . *Jew* is now considered derogatory. Usages like 'a Jew lawyer' or 'a Jew holiday' are offensive to Jews, and sensitive non-Jews avoid using them." *Id.* at 17. "[T]he fact that [Judge Cunningham] sometimes attaches an overt negative qualifier to the term 'Jew' (as in his repeated use of the term 'fuckin' Jew') underscores the fact that the animus that he expresses toward the individual person whom he is addressing at the moment is deeply enmeshed with the negative attitude he already feels toward the group as a whole." Exh. 37, ADL Letter-Brief at 4.

Tackett also recalls Cunningham instructing his daughter to break up with "that Jew boy" when referring to her then-boyfriend. Exh. 17, Tackett Decl. ¶ 21. Drawing on his own research, Prof. Stone reports the term "Jewboy" is a belittling term. Exh. 27, Stone Report at 19.

Judge Cunningham also employs negative stereotypes and tropes about Jewish people. He professes to believe that Jews "need[] to be shut down because they control[] all the money and all the power." Exh. 17, Tackett Decl. ¶ 9. "[A]llegations of Jewish control of ... industries and entities are intended to support the conspiratorial, anti-Semitic contention that Jews are attempting to enrich and empower themselves and manipulate non-Jews to render the non-Jewish population submissive and powerless to stop a poorly-defined Jewish agenda." Exh. 37, ADL Letter-Brief at 5.

Judge Cunningham also stated that Jews were "dirty." These are common Jewish tropes. Professor Stone explains that although the "dirty" trope is "ancient," Exh. 27, Stone Report at 18, it was used in an anti-Semitic speech by Judge Cunningham's late pastor, *id.* at 13, and "it was common for European anti-Semites, most conspicuously the Nazis, to describe Jews not only as 'dirty' or 'filthy' but as 'parasites,' 'rodents,' 'bacteria,' or 'scum.'" *Id.* at 18. The idea that Jewish people control the world's finances and pull the levers of power is also an old anti-Jewish canard, expressed in conspiracy theories like the *Protocols of the Elders of Zion*. *See* Prager & Telushkin, *Why the Jews?* 42, 202 n.3 (describing *Protocols* as forgery which "claims to outline the program of a Jewish world conspiracy").

"Taken as a whole, [Judge Cunningham's] repeated references to 'fuckin' Jews' and 'kikes,' his use of the term 'Jew' as a pejorative, and his apparent belief in the anti-

Semitic conspiracy theory that Jews control money and power make it impossible to avoid the conclusion that he is an anti-Semite. The fact that he called Mr. Halprin a 'goddamn kike' and a 'fuckin' Jew' after the trial ended reinforces this conclusion." Exh. 37, ADL Letter-Brief at 5 (internal citation omitted).

These statements reflect lifelong prejudices. It is implausible that Judge Cunningham only acquired his animosity toward Jews in the not-quite three years between the conclusion of Randy Halprin's trial in June 2003 and 2006 when Amanda Tackett recalls hearing these statements. As Tammy McKinney states, Judge Cunningham has "always" been bigoted and has a long history—pre-dating the trial—of making offensive and derogatory remarks about Jewish people and other racial and religious minorities. *See* Exh. 9, McKinney Decl. ¶ 5 ("always been like this"), ¶ 8 (by the age of thirty), ¶ 16 (calling brother "nigger Bill" as long as she can remember). And his brother Bill says Judge Cunningham has been using the word "nigger" to mock him "his entire life." Exh. 21, Martin, *White, Straight, and Christian*.

Judge Cunningham must have been aware of Mr. Halprin's Jewish identity no later than the beginning of trial. He certainly was aware that Mr. Halprin is Jewish before the close of evidence in the guilt phase. *See* 49 RR 46-47 (Halprin's testimony about getting "picked on" for being Jewish).

Given his longstanding prejudices, Judge Cunningham must have been aware that he was required to recuse or disqualify himself on the basis of bias.

Texas law mandated his recusal even without a motion. *See* Tex. Civ. R. 18b(a), (b)(1)-(2) ("[a] judge must recuse" whose "impartiality might reasonably be questioned" and who "has a personal bias or prejudice concerning . . . a party"); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (finding "bias as a ground for [judicial] disqualification [where] bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."), *overruled in part on other grounds by De Leon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004); *see* 48B Robert Schuwerk & Lillian Hardwick, *Texas Practice Series: Handbook of Texas Lawyer and Judicial Ethics* § 40:44 ("a judge may err by not recusing *sua sponte*" on a record indicating bias).

Judge Cunningham's failure to remove himself is significant for multiple reasons. First, his failure to recuse himself in the face of his legal duty to do so provides a further inference that he was acting pursuant to his bias. (If, on the other hand, no Texas law mandated Judge Cunningham's recusal or disqualification *sua sponte*, then Texas law's failure to so mandate would itself be constitutionally problematic under due process.) Second, Judge Cunningham's decision to sit in the case triggered "a presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), that shielded his bias from scrutiny and correction.

Like the case of the "many dishonest judges exposed and convicted through 'Operation Greylord,' a labyrinthine federal investigation of judicial corruption in Chicago," *Bracy v. Gramley*, 520 U.S. 899, 901 (1997), Judge Cunningham's covert, unremitting racial and religious prejudice is shocking and "happily, not the stuff of typical judicial-disqualification disputes." *Id.* at 905. Amanda Tackett herself describes Judge Cunningham as an outlandish figure, more akin to a racist villain in a movie like "Mississippi Burning" than a real-life judge. *See* Exh. 17, Tackett Decl. ¶ 19; Exh. 21, Martin, *White, Straight, and Christian*.[15] But the evidence presented here is of a piece with Judge Cunningham's recorded statements and acknowledged conduct. Judge Cunningham asserted that "my faith" as a Christian gave him reasons for creating a financial incentive for his children to marry only white, Christian, heterosexuals.[16] Exh. 22 (video); *see also* Exh. 21, Martin, *White, straight and Christian*. He made that trust in 2010 and only later said his views had changed. *See* Exh. 26, "A Personal Note from Vic Cunningham." But in 2014 he used payment for his daughter's legal

[15] But it should come as no surprise that Judge Cunningham hid his biases from public view for so long. As historian Bryan Stone reports, "the relative success and general tolerance Jews have enjoyed in Dallas may have had the perverse effect of driving anti-Semitic attitudes and speech from public into private spaces." Exh. 27, Stone Report at 1. In places like exclusive, private clubs, "where the presence of Jews (not to mention of African Americans, Latinos, and often women) could be strictly regulated, members of the city's white, male, gentile elite could be themselves." *Id.* at 10. Thus, it is quite unremarkable that anti-Semitic views like Judge Cunningham's could occur unabashedly, and without the threat of public stigma.

[16] As the late Justice Scalia wrote, when a judge's religious beliefs conflict with his oath and duty to apply the law, "the choice ... is resignation." Antonin Scalia, *God's Justice and Ours: the Morality of Judicial Participation in the Death Penalty, in Religion and the Death Penalty: A Call for Reckoning* 234 (Owens, et al., eds., 2004).

education to induce her to break up with her longtime boyfriend because he was Jewish. Exh. 19, Samuels Decl. ¶ 3. *See also* Exh. 21, *White, straight, and Christian* at 6-7 (text message from Cunningham's son in 2018 stating that, at that time, son was "making my father except [*sic*] interracial relationships").

Judge Cunningham's actions in opposition to mixing on the basis of race and religion are familiar and odious. Historically, reasons for anti-miscegenation are grounded in a belief in the inferiority of other races and an effort to "maintain White Supremacy." *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."). Viewed through the lens of history, Cunningham's opposition to interracial marriage, and his invocation of "my faith of being a Christian" to justify this belief, reflect his endorsement of white supremacy and his attendant belief in the social and biological inferiority of non-white persons.

Judge Cunningham was a protégé of Rev. W.A. Criswell, whose segregationist views were notorious, *see* Jones & McKee, *Baptists eulogize Criswell ministry*:

> "Criswell became one of the pulpit's most visible defenders of segregation." In a speech in South Carolina, "Criswell demanded separation not just of the races, but of religions as well. Invoking images of filth and dirt frequently used in depictions of African

> Americans and Mexican Americans, Criswell called integration the work of 'outsiders' (by implication Jews) in 'their dirty shirts.'" If not stopped, he continued, they would "get in your family." Christians, he said, had to resist this amalgamation and "stick to their own kind." Views like Criswell's were common in Dallas, Phillips says, but "Criswell's vitriol still stood out in an age of widespread demagoguery and garnered national headlines."

Exh. 27, Stone Report at 13 (quoting Michael Phillips, *White Metropolis: Race, Ethnicity, And Religion in Dallas, 1841–2001* 133–34 (2006)).

Judge Cunningham's confessed anti-miscegenation attitudes dovetail precisely with the reports of declarants that Judge Cunningham sought to further white supremacy in his role as judge and would-be district attorney. Tackett reports that Judge Cunningham made the slurs about the Jewish and Latino Texas Seven defendants shortly before "launch[ing] into a campaign speech about immigration and the importance of White people in the Dallas community." Exh. 17, Tackett Decl. ¶ 15. Judge Cunningham spoke admiringly of a "style of justice where we didn't have to worry about niggers, Jews, wetbacks, or Catholics." *Id.* ¶ 7.[17] He also believed that "my job is to prevent niggers from running wild again." *Id.* ¶ 13.

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[17] Judge Cunningham's ideology parallels the historic rhetoric of the early twentieth century Ku Klux Klan. As Professor Stone explains,

> Whereas the Reconstruction-era organization focused its wrath almost entirely on freed African Americans, the Second Klan was more purposeful in its effort to build a dues-paying membership, and it played to the nation's broadest and deepest prejudices against blacks, Catholics, immigrants, socialists, and Jews. "[Simmons] would warn that 'degenerative' forces were destroying the American way of life," explains historian Linda Gordon. "These were not only black people but also Jews, Catholics, and immigrants. Only a fusion of racial purity and evangelical Christian morality could save the country."

McKinney also heard Judge Cunningham say "that he could save Dallas from 'niggers, wetbacks, Jews, and dirty Catholics.'" Exh. 9, McKinney Decl. ¶ 10. Again, Judge Cunningham not only thinks in racial stereotypes, he equates Mr. Halprin's group and Catholics of any ethnicity with the non-whites he denigrates.

Judge Cunningham expressed odious group-based beliefs about criminality and just deserts regarding black defendants. Judge Cunningham repeatedly used the term "T.N.D." to characterize the sentences that black defendants received. *See* Exh. 17, Tackett Decl. ¶ 11. This reflects group-based stereotypes about black criminality and the view that non-white defendants deserve punishment that white defendants would not deserve. Even if Judge Cunningham had not spoken directly about Mr. Halprin's trial and used pejorative language that bespeaks his anti-Semitic bias, numerous other pieces of evidence would establish his bias.

Based on her lifelong association with Judge Cunningham, McKinney believes that he sought out positions of power so that he could hurt people from different races and religions. Exh. 9, McKinney Decl. ¶ 9. Judge Cunningham asserted publicly that he "wanted the challenge" of presiding over the Texas Seven trials and believed it was his "destiny" to be a judge. Exh. 7, *Two Wilson Grads*. Those public statements are

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Exh. 27, Stone Report at 6 (quoting Linda Gordon, *The Second Coming of the KKK: The Ku Klux Klan of the 1920s and the American Political Tradition* (New York, 2017)). This "second" incarnation of the Klan was especially successful in Dallas, which was considered a "Klan town." *Id.* at 6-7.

consistent with the statements and views attributed to him by Tackett, specifically, "he was anointed by God and chosen by God to preside over the Texas 7 trials." Exh. 17, Tackett Decl. ¶ 6. In 2018, he still proudly boasted that he "has put more criminals on Death Row than almost any judge in the nation." Exh. 20, "You Know Judge Vic."

Even setting aside the evidence of anti-Semitic animus Judge Cunningham expressed against Mr. Halprin, there is yet another reason that Judge Cunningham likely was biased against him—the fact that Mr. Halprin participated in the escape and robberies with Latino men whom he called "wetback" or "spic." Exh. 9, McKinney Decl. ¶¶ 5, 8, 10, 12; Exh. 17, Tackett Decl. ¶¶ 7, 9, 15. This association may itself have caused an intolerable risk of bias. And Mr. Halprin's close association with the Latino men was centrally at issue in trial. *See* 53 RR 126-128; 135-136, 139.

B. In Light of All the Facts and Circumstances, an Objective Observer Would Find the Risk of Bias Intolerably High

An objective observer would conclude that Judge Cunningham could not prevent his personal prejudice against Jewish people from affecting his treatment of Mr. Halprin, whom he knew to be Jewish. This Court should find that Judge Cunningham's "prejudice precluded him from being the impartial judge that the Due Process Clause requires," Exh. 37, ADL Letter-Brief at 5, or, at a minimum, that his prejudice created an intolerably high risk of bias in violation of the Constitution.

Judge Cunningham's participation in Mr. Halprin's case threatens the public's confidence in the criminal justice system. Exh. 37, ADL Letter-Brief at 5. Those that know Judge Cunningham's bias best—including his own mother—believe that it defined him. He could not have ruled impartially in Mr. Halprin's case. Average citizens doubted his ability to rule fairly just by reading the facts unearthed in the *Dallas Morning News* story—a mere subset of the total evidence alleged here. Exhibit 30. And courts and judicial conduct tribunals around the country have found similar overt statements of racial bias prevent a judge from satisfying the appearance of impartiality.

"Not only is having a fair and unbiased judge critical to the protection of a defendant's fundamental constitutional rights, it is essential to maintaining public confidence in the criminal justice system as a whole."[18] Exh. 37, ADL Letter-Brief at 5; *see also Ex parte Thuesen*, 546 S.W.3d 145, 151 (Tex. Crim. App. 2017) ("The manner in which our judicial system handles the recusal of judges affects public

[18] Famed legal scholar and defender of States' interests in comity and finality, Professor Paul Bator, made the same point in his seminal work on federal habeas review of state court judgments:

> Claims of violations of due process because the state trial judge was bribed or dominated by a mob are "double-level" not only in the sense that, if true, they invalidate all of the findings of the trial court (including findings with respect to other federal constitutional rights, *e.g.*, admissibility of a confession), but also because the findings of the trial court itself with respect to these very allegations should not be deemed conclusive: an allegedly mob-dominated court's finding that it is not mob-dominated should surely not immunize that question from subsequent inquiry; and, I submit, the due process clause requires that the question of mob domination should be passed on by at least *one* tribunal (state or federal) which is concededly free of that flaw.

Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455 n.28 (1963) (emphasis in original).

confidence in the judiciary, as it goes to the very heart of the promise of impartiality.") (internal quotation marks and citation omitted). There can be nothing more offensive to constitutional commitments to racial and religious equality than Judge Cunningham's comments. Judge Cunningham's bias in Mr. Halprin's proceedings harms not only Mr. Halprin, but undermines the public's confidence that criminal justice has been—and will be—dispensed. *See Williams*, 136 S. Ct. at 1909 ("[T]he appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."); *Buck*, 137 S. Ct. at 778 (relying on racist stereotypes "poisons public confidence in the judicial process," and undermines the legitimacy of "the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts." (with alterations)); *Pena-Rodriguez*, 137 S. Ct. at 869 (finding constitutional remedy for juror's racial bias is "necessary to prevent a systemic loss of confidence in jury verdicts").

The Fifth Circuit has found a judge was not impartial on similarly egregious facts. In *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976), a judge met an attorney at a motel swimming pool during a bar association convention. *Id.* at 468. The judge told the attorney that "he was going to preside at [Brown's] trial and 'that he was going to get that nigger.'" *Id.*, citing *Murchison*, 349 U.S. at 136, and the "fair trial concept," the Fifth Circuit found "the judge's statement did not comport with the appearance of

justice, and it cannot be said from the record alone that appellant received a fair trial." *Id.* at 470.

Judicial conduct tribunals have also found that making private, bigoted comments threatens the court's appearance of impartiality, even where there was no direct comment on a criminal defendant in a proceeding before the judge.

- *In re Stevens,* 645 P.2d 99, 99-100 (Cal. 1982): In California, a superior court judge continually referred to black litigants as "coons," "jigs," "niggers," and to Latinos as "Mexican jumping beans" and "spics" in statements to "friends," court personnel, court clerks, and in "private." His discipline was public censure.
- *In re Complaint of Judicial Misconduct*, 751 F.3d 611 (U.S. Comm. on Judicial Conduct and Disability 2014): Misconduct included "hundreds of inappropriate email messages that were received and forwarded from [District Judge] Cebull's court email account," including "race-related emails that 'showed disdain and disrespect for African Americans and Hispanics, especially those who are not in the United States legally'; 'emails related to religion [that] showed disdain for certain faiths'; 'emails concern[ing] women and/or sexual topics and were disparaging of women'; 'emails contain[ing] inappropriate jokes relating to sexual orientation'...." *Id.* at 616. The Committee adopted the Ninth Circuit

Judicial Council's conclusion that Judge Cebull's "email practices create a substantial possibility that his neutrality could be questioned" and ordered training in order "[t]o restore the public's confidence that any possible conscious or unconscious prejudice will not affect future decisions." *Id.* at 624.

- *In re Eakin*, 150 A.3d 1042, 1058 (Pa. Ct. Jud. Disc. 2016): Based on its review of the stipulated evidence—hundreds of those emails are offensive on the basis of race, gender, sexual orientation, religion, class or ethnicity--the Court of Judicial Discipline determined that the Judicial Conduct Board had established by clear and convincing evidence that Pennsylvania Supreme Court Justice Eakin's conduct violated Canon 2A of the Code of Judicial Conduct - failure to conduct himself in a manner that promotes confidence in the integrity and impartiality of the judiciary.

Those who knew best Judge Cunningham's prejudiced beliefs doubt his ability to perform his judicial duties impartially. Judge Cunningham's own mother considered his bigotry his "biggest burden," Exh. 9, McKinney Decl. ¶ 17, and predicted his bigotry would be "his downfall." *Id.*; Exh. 17, Tackett Decl. ¶ 17. Amanda Tackett believes that Judge Cunningham could not set aside his biases when he was a judge. Exh. 17, Tackett Decl. ¶ 23. Tammy McKinney, drawing on her "personal and intimate knowledge of [Judge Cunningham]," "do[es] not believe for

one second that Vic could be impartial in any of the Texas Seven cases, or any of the other cases that involved Jewish people, or people of color, in his courtroom." She bases her view on the total picture of Judge Cunningham's prejudice:

> [their] long association as family friends, how openly and honestly he has constantly expressed his prejudices and bigotry, how much he has used his role in the Texas 7 case to promote himself, [] how he talked with certainty about the outcome of the Texas 7 cases, and the way he has repeatedly referred to Latinos as "wetbacks" and Jewish peoples as "goddamn kikes."

Exh. 9, McKinney Decl. ¶ 18.

Finally, recent empirical research on explicit and implicit biases in criminal sentencing appears to confirm common sense: that a judge who harbors these explicit negative stereotypes about groups would not judge individuals from those groups fairly. Even many judges who disclaim any conscious bias against Jewish people—and who take an oath to judge impartially—still exhibit implicit biases in judging Jewish people. A study of actual judges surveyed the judges' explicit attitudes toward Asians and Jews, tested them for implicit associations that revealed bias, and asked them to perform a mock sentencing task involving a Jewish or Asian defendant. Both "[f]ederal and state judges displayed strong to moderate implicit bias against Jews (relative to Christians) on the stereotype [implicit association test], such that Jews were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming), and Christians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous)." Justin D. Levinson, Hon. Mark Bennett & Koichi Hioki, *Judging Implicit Bias: A*

National Empirical Study of Judicial Stereotypes, 69 Fla. L. Rev. 63, 105 (2017). Strikingly, the results showed federal judges were more likely to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant. *Id.* at 104, 105 Fig. 1, 110-11.

Another study of racial bias among jurors in capital sentencing makes an even more striking finding. Mock juror-participants who had "a higher self-reported[19] racial bias score" were more likely to "giv[e] the death penalty when the victim of the murder was White." Justin D. Levinson, Robert J. Smith, Danielle Young, *Devaluing Death*, 89 N.Y.U. L. Rev. 513, 562 (2014). In other words, explicitly biased jurors acted on those biases in their sentencing. These studies suggest, at a minimum, that judges who harbor explicit negative stereotypes about Jewish people—whether they intend to or not—likely introduce their biases into the courtroom.

For all these reasons, Judge Cunningham's participation in the trial violated Mr. Halprin's right to due process of law. The judgments of conviction and sentence that Judge Cunningham entered against Mr. Halprin must be vacated so he can be tried before an impartial tribunal.

[19] Participants were given the "Modern Racism Scale" which "asks participants to rate their agreement or disagreement with a series of statements, such as 'Discrimination against blacks is no longer a problem in the United States.'" Levinson, *supra*, at 556.

III. Access to Review

A. MR. HALPRIN SATISFIES THE REQUIREMENTS OF SECTION 5(a) OF ARTICLE 11.071

1. Legal Standard

Texas law permits successive writs challenging the same conviction where the applicant's new

> "claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable the date the applicant filed the previous application."

Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). In order

> "to satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence."

Ex parte Campbell, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007).

The factual basis of a claim is unavailable if "the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the previous application was filed. Tex. Code Crim. Proc. art. 11.071, § (5)(e).

2. Application of Law to the Facts of this Case

a. The Factual Basis of the Claim Was Not Previously Ascertainable Through the Exercise of Reasonable Diligence

The factual basis for Mr. Halprin's judicial bias claim was not, and could not have been, "presented previously." Mr. Halprin's initial application was filed on April

6, 2005. Order, *Ex parte Randy Ethan Halprin*, Nos. WR-77,175-01, WR-77,175-02, WR-77,175-03, WR-77,175-04 (Tex. Crim. App. Mar. 2013). Mr. Halprin then filed additional documents through September 27, 2010, which this Court concluded were subsequent writs. *Id.*

Judge Cunningham's failure to remove himself (recuse or disqualify) from the trial falsely communicated that there was no cause for questioning his impartiality. His official silence and inaction did two things relevant to the § 5(a) inquiry: it deceived Mr. Halprin and his counsel, and it triggered the "presumption of honesty and integrity in those serving as adjudicators," *Withrow*, *supra*, 421 U.S. at 47, that continued in effect until, at the earliest, the *Dallas Morning News* exposed Judge Cunningham's bigotry on May 18, 2018. Due to Judge Cunningham's silence and inaction, and the presumption they triggered, the facts underlying this claim were beyond Mr. Halprin's ability to discover previously because their revelation was "primarily outside of [his] counsel's control." *Ex parte Gobert*, No. WR-77,090-01, 2012 WL 47689, at *1 (Tex. Crim. App. Feb. 15, 2012) (per curiam) (not designated for publication) (deeming an untimely habeas application properly filed because application relied on "circumstances primarily outside of counsel's control").

The United States Court of Appeals for the Eleventh Circuit faced a similar situation when it permitted a petitioner to proceed under the abuse of the writ doctrine on a claim of judicial bias. *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995).

Porter relied on a new affidavit by his trial court's clerk alleging (1) that the judge changed venue in order to improve chances of a first-degree murder conviction and (2) that the judge was predisposed towards the sentence of death, which under Florida law was up to the judge alone to determine. *Id.* The account in the affidavit was partially corroborated by the judge's interview with a local newspaper, during which the judge stated he was always going to sentence Porter to death after the guilty verdict. *Id.* After being presented with a new petition for post-conviction relief, state courts ruled that the claim was procedurally defaulted, and the district court denied relief. *Id.* at 1488.

The Eleventh Circuit reversed, finding "an external impediment preventing counsel from constructing or raising the claim"—specifically, that an attorney conducting a reasonable investigation would not have discovered evidence of bias. *Id.* at 1489. The court stated:

> We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice.

Id. The court concluded that Porter proffered sufficient evidence to warrant an evidentiary hearing on whether he or his attorney had sufficient notice of the judge's

bias in the case; if the district court found they did not, Porter would establish cause for not bringing the claim in his initial petition. *Id.* at 1490. The court expressly stated that the prejudice prong of the federal cause/prejudice test would then be satisfied, and the federal claim could then be heard at the merits. *Id.* at 1490 n.13 ("If Porter can prove that his sentencing judge lacked impartiality, we readily conclude Porter would also have satisfied the prejudice prong."). On remand, the district court found that Porter satisfied the cause prong, and Porter eventually obtained relief in state post-conviction. *Porter v. State*, 723 So. 2d 191, 195 (Fla. 1998). *See also Walker v. Lockhart*, 763 F.2d 942, 961 (8th Cir. 1985) (en banc) (concluding that newly discovered evidence empowered the court to reach a judicial bias claim raised in a successive petition and grant relief); *see also id.* at 962 (Arnold, J., concurring) (noting that judicial bias claim is not premised "on any assessment of actual prejudice. . . .").

Information about Judge Cunningham's anti-Semitic views and animus towards Mr. Halprin due to Halprin being a Jew was disclosed by Cunningham's close associates—individuals with whom defendants are not normally expected to speak. *Cf.* Findings of Facts, Conclusions of Law & Recommendation, at 4, *Ex parte Storey*, No. WR-75,828-02 (Crim. Dist. Ct. No. 3, Tarrant Cty., Tex. May 8, 2018) (finding successive habeas applicant diligent under Article 11.071 where application relied on information members of the murder victim's family—individuals who "in most cases .

. . do not wish to speak to lawyers representing the person found guilty of killing their loved one").

While Mr. Halprin cannot reasonably be expected to have discovered the factual basis supporting this judicial bias claim previously in order to comply with statutory obligations, *see* Tex. Code Crim. Proc. art. 11.071, § 3(a) (requiring state habeas counsel to "investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus"), he has demonstrated diligence here: the first hint of the facts underlying this claim became known on May 18, 2018, when the *Dallas Morning News* revealed the anti-miscegenation provision in Judge Cunningham's trust, and his use of the n-word to describe criminal defendants who happened to be black. However, the *Dallas Morning News* article mentioned no specific animus related to Mr. Halprin or his co-defendants. It was only through extraordinary diligence that Mr. Halprin discovered Judge Cunningham's anti-Semitism, his use of ethnic slurs to describe Latinos, and his specific bias towards Mr. Halprin and his co-defendants based on their religious identity and ethnicity. The requirements of Section 5(a)(1) are satisfied.

b. Mr. Halprin Has Presented a Meritorious Claim of Judicial Bias

Mr. Halprin has presented more than a prima facie meritorious case of judicial bias supported by declarations of two disinterested witnesses and corroboration.

B. THE CONSTITUTION REQUIRES REVIEW OF MR. HALPRIN'S JUDICIAL BIAS CLAIM

Under the Supremacy Clause of the United States Constitution,[20] and the Due Process Clause of the Fourteenth Amendment, this Court may not decline to hear Mr. Halprin's federal judicial bias claim. The Constitution places limits on the ability of a state court to refuse to consider a claim on collateral review, *see, e.g.*, *Montgomery v. Alabama*, 136 S. Ct. 718, 732 (2016), and it would transgress those limits to interpret § 5 of Article 11.071 to foreclose consideration of Mr. Halprin's claim.

When state courts provide for collateral review, due process protections apply. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). State post-conviction procedures violate the Due Process Clause when they do not "'compor[t] with fundamental fairness.'" *Osborne*, 557 U.S. at 69 (quoting *Finley*, 481 U.S. at 556). "If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery*, 136 S. Ct. at 731 (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)). The question presented by this case is whether a state court may, consistent with the Constitution, hold that its collateral proceeding is closed to a federal claim where a state court judge—through a single action—both violated the defendant/petitioner's federal due process rights and

[20] U.S. Const. art. VI, ¶ 2.

concealed the evidence of that violation. It would be fundamentally unfair, and therefore unconstitutional, for this Court to hold that Judge Cunningham could conceal his anti-Semitic bias from Mr. Halprin and thereby both deny him the right to an impartial judge that the Constitution requires and deny him any opportunity to vindicate his federal right to an impartial judge.

Additionally, a state procedural law is invalid if it "raises an insuperable barrier to one making claim to federal rights. The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the State court." *Michel v. Louisiana*, 333 U.S. 91, 93 (1955) (quoting *Parker v. People of the State of Illinois*, 333 U.S. 571, 574 (1948)).

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). No one could question that Mr. Halprin asserts a "paramount federal constitutional ... right," *Johnson v. Avery*, 393 U.S. 483, 486 (1969), in his claim that Judge Cunningham had a duty not to preside over a case in which he harbored anti-Semitic bias against a defendant, and anti-Latino bias against his co-defendants. "It is clear ... that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be

invalidated." *Id.* If § 5(a)(1) of Article 11.071 is interpreted to preclude consideration of Mr. Halprin's claim, that provision is invalid.

The application of § 5's preclusion rule to Mr. Halprin would deny him a reasonable opportunity to have his claim heard and determined by a state court. Only Judge Cunningham knew that he held anti-Semitic bias against Mr. Halprin and anti-Latino bias against his codefendants. His failure to disqualify himself or otherwise reveal his bias created an insuperable barrier to Mr. Halprin protecting himself from Judge Cunningham's unconstitutional bias. Mr. Halprin acted with an excess of diligence by investigating whether, in addition to the anti-black bias revealed in the *Dallas Morning News* article, Judge Cunningham was anti-Semitic. Due to Judge Cunningham's denial of bias—which continues to the present, *see* Jennifer Emily, *Jewish Texas 7 member says judge who sent him to death row is anti-Semitic, asks for new trial*, Dallas Morning News, June 11, 2019 (Exhibit 38)—Mr. Halprin could not reasonably have presented his claim during any previous state collateral review proceedings.

"If a suit [for a constitutionally required remedy] is precluded in the national courts ... and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be ... it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation." *General Oil*

Co. v. Crain, 209 U.S. 211, 226 (1908). That is precisely the unconstitutional scenario the State of Texas asserts exists in this case.

Texas asserts that Congress has withdrawn the jurisdiction of federal habeas courts to hear Mr. Halprin's claim because it was not presented in his initial habeas petition, Respondent's Motion to Dismiss Successive Petition (Exhibit 39), and that § 5 of Article 11.071 precludes review in state court. Exh. 33 at 5. The Supreme Court has held a state-actor may not block a would-be federal habeas petitioner from presenting his claim to a federal court. "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson*, 393 U.S. at 485. *Johnson* describes several cases in which the Supreme Court invalidated a state mechanism for preventing the assertion of federal claims in federal habeas courts. *Id.* at 485-87. In this case, Texas merely asserts the creation of a novel mechanism: a state actor concealing his violation of a federal constitutional right until initial state and federal habeas proceedings have ended.

"[I]n *Ex parte Hull*, 312 U.S. 546 (1941), th[e Supreme] Court invalidated a state regulation which required that habeas corpus petitions first be submitted to prison authorities and then approved by the 'legal investigator' to the parole board as 'properly drawn' before being transmitted to the court. ... [The] Court held that the

regulation violated the principle that 'the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.'" *Johnson*, at 486-87 (quoting *Hull*, 312 U.S. at 549). Texas's argument merely substitutes Judge Cunningham's decision not to disqualify himself for the "legal investigator" in *Hull*. The effect is the same in both cases: a state actor decides whether a would-be federal habeas petitioner may present his claim to a court with the power to consider it. Whereas the use of the "legal investigator" was at least defensible as "necessary to maintain prison discipline," *Johnson*, 393 U.S. at 486, Judge Cunningham had a duty under state law and the Due Process Clause to remove himself from the case.

There is no doubt that Mr. Halprin's claim satisfies § 5(a). However, were this Court to decide the statute forecloses consideration of the claim, it must find the provision unconstitutional as applied. The unlawful conduct of a state court judge has, according to the State, foreclosed the possibility of federal habeas corpus review. Interpreting § 5(a) to foreclose a state-court remedy for a constitutional violation caused by a biased state court would be fundamentally unfair and violate due process.

CLAIM 2 THE FUTURE-DANGEROUSNESS SPECIAL ISSUE IN THE TEXAS CAPITAL-SENTENCING SCHEME IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In the alternative, this Court should vacate the death sentence imposed on Mr. Halprin because the future-dangerousness special issue, the affirmative answer to which was necessary for his death sentence, is void for vagueness under the U.S. Constitution.

I. Governing Law

Justice Gorsuch recently wrote that to be sentenced under a vague law is to be sentenced under no law at all. *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). Due process is violated when an individual is subjected to a criminal law that is "hopelessly indeterminate by being too abstract[,]" as both this Court and the Supreme Court of the United States recognized. *State v. Doyal*, — S.W.3d —, No. PD-0254-18, 2019 WL 944022, at *6 (Tex. Crim. App. Feb. 27, 2019) (en banc), *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), *Davis*, 139 S. Ct. at 2336. Sentencing under a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" violates the due process guarantee. *Johnson*, 135 S. Ct. at 2556. The future-dangerousness special issue (hereinafter "FDSI"), submitted to Mr. Halprin's jury as a necessary part of deciding whether to impose a death sentence, is such a law: a hopelessly indeterminate and abstract law that denies fair notice and invites arbitrary enforcement. This court should declare it unconstitutional and vacate the death sentence imposed on Mr. Halprin.

Like the statutes at issue in the *Johnson* line of cases, this statute (1) leaves grave uncertainty about how to estimate the probability of this future act, or what it is, and (2) fails to give guidance for what the threshold finding of probability should be. This Court, just like the Supreme Court in *Johnson*, *Dimaya*, and *Davis*, has failed in its efforts to establish a non-vague standard for the future-dangerousness finding. Therefore, the FDSI is vague in the same way the federal statutes were.

A. THIS COURT MUST APPLY THE NEW STANDARD ANNOUNCED IN *JOHNSON*

1. Vagueness under *Johnson*

In *Johnson*, the Supreme Court announced a new standard for unconstitutional vagueness. Writing for the Court, Justice Scalia enunciated the well-established due-process principle that a statute is unconstitutional when it "denies fair notice to defendants and invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2557. He then described a new two-prong test that determines whether vagueness violates due process. *Id.* First, a statute cannot require the factfinder to assess the hypothetical risk of violence posed by an idealized conduct in the abstract. *Id.* The question at this first stage, the measurement prong, is "How to measure the risk of violence?" Second, a sentencing statute cannot leave uncertainty about the threshold level of risk of violence required for the finding. *Id.* at 2558. The question at the second stage is "What is the threshold for the finding of the risk of violence?" If a statute combines these two defects—indeterminacy about how to measure risk and indeterminacy about how

much risk it takes to cross the threshold for culpability—then it "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

2. The *Johnson* rule applied

The three statutes invalidated under the *Johnson* standard share a similar function: they make the defendant eligible for a higher penalty upon finding that conduct he engaged in, in the abstract, was associated with a potential risk of violence. The statute in *Johnson* itself was a provision of the Armed Career Criminal Act (ACCA), under which a greater penalty could be imposed if the defendant had three previous convictions for any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (2016). Previously, the Supreme Court held that the "conduct" in the statute was to be evaluated "categorically," meaning in the abstract from the factual circumstances, as an "ordinary case" of the offense in question. *Johnson*, 135 S. Ct. at 2557 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990); *Begay v. United States*, 533 U.S. 137, 141 (2008)). First, applying the measurement prong, the Court decried the imprecision of the statutory language. Crucially, the defendant's own behavior was not enough: assessing "potential risk" attendant to conduct required abstract speculation by the factfinder about the possibility of violence. *Johnson*, 1325 S. Ct. at 2557. Second, applying the threshold prong, the Court similarly found little guidance in the imprecise "serious potential risk of violence" standard of the hypothesized conduct. *Id.* at 2558.

Two years later, the Supreme Court applied *Johnson* in a different context. The respondent in *Dimaya* was previously found guilty of "aggravated felonies," which included "crimes of violence" under 18 U.S.C. § 16(b); on that basis, he was found deportable under the Immigration and Nationality Act (INA). *Dimaya*, 138 S. Ct. at 1210. The residual clause of § 16(b) defined a crime of violence as such "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b)(B) (2016). Though this was a civil case, the Court held that *Johnson* applied, and used its two-prong analysis. *Dimaya*, 138 S. Ct. at 1215. The Court found the statue required hypothesizing an abstract "ordinary case" which involves a risk of physical force, and that it left uncertainty as to the threshold "substantial risk" of potential force that makes a crime violent. *Id.* at 1215-16. Therefore, the residual clause was also declared to be in violation of due process. *Id.* at 1216.

This year, the Court once again applied *Johnson* to declare a federal sentencing provision unconstitutional. *Davis*, 139 S. Ct. at 2336. The statute at issue in *Davis* created greater penalties for possessing a firearm in connection with any felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). After examining the statute's text, context, and history, the Court

concluded that in light of *Johnson* and *Dimaya*, § 924(c)(3)(B) "must be held unconstitutional too." *Davis*, 139 S. Ct. at 2326.

Similarly, this Court recently applied the *Johnson* standard to declare a Texas criminal statute unconstitutional. In *State v. Doyal*, the statute in question was a "catch-all" provision of the Texas Open Meetings Act that made certain meetings between governmental officials a crime. *Doyal*, 2019 WL 944022, at *1. This Court declared the statute unconstitutional because, "[l]ike the statutes in [*Johnson* and *Dimaya*]," it was "hopelessly abstract." *Id.* at *7. The Court explained that the statute required abstracting from actual, real-world conduct and engaging in "a sort of extratextual-factor inquiry that is unmoored to any statutory text." *Id.*

B. THE ROLE THAT THE FUTURE-DANGEROUSNESS SPECIAL ISSUE PLAYS IN TEXAS'S CAPITAL SENTENCING SCHEME IS ANALOGOUS TO THE RESIDUAL CLAUSE IN THE ACCA

There is no material difference between the function of the provisions invalidated in *Johnson*, *Dimaya*, and *Davis*, and the FDSI in Texas. The Texas Code of Criminal Procedure provides, in relevant part, that a predicate finding for a death sentence is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) (2013). The statute does not provide specific definitions for its terms, and this Court has consistently declined to construe the terms, instead holding that a jury can interpret them according to their common-usage meaning. *See*

e.g. Saldano v. State, 232 S.W.3d 77, 91 (Tex. Crim. App. 2007), *Ladd v. State*, 3 S.W.3d 547, 572–73 (Tex. Crim. App. 1999), *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977). In other words, each juror is left to define for themselves the terms' definitions, and then to make a finding of a probability of an abstract act of violence occurring sometime in the projected course of the defendant's future, unmoored from real-world facts or statutory elements. This speculative inquiry is a necessary finding for the imposition of a death sentence.

These additional statutory criteria are subject to the distinct due-process test the Supreme Court created when invalidating § 924(e)(2)(B)(ii)'s residual clause on vagueness grounds. *See Johnson*, 135 S. Ct. at 2557 ("Increasing a defendant's sentence under [the residual clause] denies due process of law.") The FDSI, like the residual clause, is a necessary finding for a greater sentence to be imposed, and thus it too must satisfy the *Johnson* vagueness test. Because the FDSI fails both prongs of the *Johnson* test—leaving "grave uncertainty" about both how to measure the type of risk required, and what threshold level of risk is required to make a finding—the FDSI suffers from the same "hopeless indeterminacy" as the residual clause, and thus fails the *Johnson* vagueness test and violates the Fourteenth Amendment.

Similarly, the provision of the ACCA struck down in *Johnson* enabled the trial court to impose a longer sentence only upon a finding that the defendant had three

previous convictions for any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §§ 924(e)(1), 924(e)(2)(B)(ii).

Texas's article 37.071 mirrors the ACCA. After being convicted of capital murder, every defendant is eligible for a life sentence in prison. Art. 37.071, § 1. However, a death sentence may be imposed only if a jury finds that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, § (2)(b)(1). Like the terms in the ACCA's residual clause, the terms "probability," "criminal acts of violence," and "society" have been intentionally left undefined by this Court, and each juror must make a subjective determination to assay their meaning. *See King*, 553 S.W.2d at 107 ("We hold that the court need not provide special definitions for these terms in its charge to the jury during the punishment stage of a capital murder trial.").

In *McGinn v. State*, 961 S.W.2d 161 (Tex. Crim. App. 1998), this Court found that, while a factual-sufficiency review is not necessary, "[a] *Jackson* review of the issue is feasible." 961 S.W.2d at 169. This Court's acknowledgment that *Jackson*[21] applies to the FDSI demonstrates that it is, to the same extent as the determinations at issue in *Johnson*, *Dimaya*, and *Davis*, a determination subject to Fourteenth Amendment due process requirements.

[21] *Jackson v. Virginia*, 443 U.S. 307 (1979)

As demonstrated by inconsistent jury verdicts in Texas's capital cases, the Texas death-sentencing procedure's lack of a "principled and objective standard . . . confirm[s] its hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2558.

C. THIS COURT MUST CONSIDER MR. HALPRIN'S *JOHNSON* CLAIM BECAUSE THE SUPREME COURT RECOGNIZED IT AS A SUBSTANTIVE RULE RETROACTIVE ON COLLATERAL REVIEW

As described above, *Johnson* announced a new standard for vagueness under the Due Process clause. The Supreme Court has held that *Johnson* announced a new "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). In *Welch*, the Court first noted in its discussion of *Johnson*: "The *Johnson* Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) *and the Fourteenth Amendment (with respect to the States)*." *Id.* at 1261-62 (emphasis added). Second, the Court briefly summarized the principle announced in *Johnson*: that applying a "serious potential risk standard" to an "idealized ordinary case of the crime" causes more unpredictable and arbitrary application than permitted by the Constitution. *Id.* at 1262. Finally, the Court held that because *Johnson* altered the substantive reach of the ACCA *as applied to those punished by the latter*, it was substantive: it changed the range of conduct to whom the ACCA sentencing minimums applied. *Id.* The same logic justifies treating *Johnson* as substantive, and

therefore retroactive, when applied to the Texas capital sentencing scheme. *See e.g. Cross v. United States,* 892 F.3d 288, 295-96 (7th Cir. 2018) (granting relief to prisoners invoking Johnson to challenge a different federal sentencing statute); *Commonwealth. v. Beal*, 474 Mass. 341, 351 (2016) (holding a state sentencing law unconstitutional under *Johnson*); *Henry v. Spearman*, 899 F.3d 703, 711 (9th Cir. 2018) (petitioner made the prima facie showing that California's second-degree murder law is unconstitutional under *Johnson*); *Shipman v. United States*, 925 F.3d 938 (7th Cir. 2019) (motion to vacate asserting vagueness of a different federal law is timely and not procedurally defaulted if it is filed within one year of *Johnson*); *Moore v. United States*, 871 F.3d 72, 80 (1st Cir. 2017) (same); *United States v. Hammond*, 354 F. Supp. 3d 28, 49 (D.D.C. 2018) ("*Johnson*'s rule—the right not to have a sentence fixed by an indeterminate and wide-ranging residual clause—instructs that a [different federal law] is unconstitutional.").

The Constitution requires the state courts that have collateral review processes to apply such rules retroactively to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). Since Mr. Halprin is invoking a substantive rule that applies retroactively in a properly presented vehicle, this Court must hear his claim on the merits.

II. This Court must declare the future-dangerousness special issue unconstitutional

Since the FDSI suffers from the same issues that made the statutes in *Johnson*, *Dimaya*, and *Davis* unconstitutional, this Court must follow the Supreme Court and declare it unconstitutional.

A. THE FUTURE-DANGEROUSNESS SPECIAL ISSUE LEAVES GRAVE UNCERTAINTY ABOUT HOW TO ESTIMATE THE PROBABILITY OF FUTURE DANGEROUSNESS

The FDSI fails the *Johnson* test's measurement prong because it leaves "grave uncertainty" about how to estimate the probability of a defendant's future dangerousness. Just as the residual clause tied "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," the FDSI forces a juror to imagine a hypothetical future act and assess "whether that abstraction presents a serious risk of physical injury." *Id.* at 2557. In fact, the FDSI is even more nebulous because it leaves a juror to imagine not only the abstraction, but also to set the parameters that define "criminal acts of violence."

The residual clause failed the *Johnson* measurement test because it required that judges evaluate "an idealized ordinary case of the crime." *Id.* at 2561. Under the Texas scheme, a juror, unequipped with the legal training and sophistication of a judge, must conceive of an act, any act, that could occur in the lifetime of the defendant and then evaluate whether that act would constitute a "criminal act of violence" that could theoretically threaten any group of people the juror deems to comprise

"society," which could, at the juror's discretion, be limited to the "society" within a penal institution. *See Rougeau v. State*, 738 S.W.2d 651, 660 (Tex. Crim. App. 1987), *overruled on other grounds by Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989) ("It is obvious to us that in deciding whether to answer the second special issue in the negative the jury would clearly focus its attention on the "society" that would exist for the defendant and *that* "society" would be the "society" that is within the Department of Corrections.").

The Texas inquiry recreates precisely the "hopeless indeterminacy" of the residual clause; there is no "principled and objective standard" to apply, and thus a juror must "resort to a different ad hoc test to guide [their] inquiry." *Johnson,* 135 S. Ct. at 2558. This Court has repeatedly held that the FDSI is not vague because jurors are appropriately guided by relying on the terms' common-usage meaning. However, this is no guarantee that every juror defines the terms' common usage the same way—as noted by the Supreme Court in *Johnson*, "common sense is a much less useful criterion than it sounds." *Id.* at 2559.

Of the residual clause, the Supreme Court asked, "[h]ow does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* at 2557 (quoting *U.S. v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of reh'g en banc)). The FDSI demands that jurors engage in

the same speculation, and thus fails to prevent the inquiry from "devolving into guesswork and intuition." *Id.* at 2559. This Court has ensured there would be no ordinary case by declining to create an exhaustive list of measures the prosecution may rely on to establish future dangerousness. *See Coble v. States*, 330 S.W.3d 253, 269 n.24 (Tex. Crim. App. 2010) (citing cases). Because the FDSI leaves "grave uncertainty" about how to estimate the probability of the defendant's future dangerousness, the Texas death-sentencing procedure fails the *Johnson* measurement test and violates the due process guaranteed by the Fourteenth Amendment.

B. THE FUTURE-DANGEROUSNESS SPECIAL ISSUE LEAVES UNCERTAINTY ABOUT THE THRESHOLD STANDARD FOR DETERMINING FUTURE DANGEROUSNESS

The FDSI likewise fails the second prong of the *Johnson* test since there can be no question that there is no determinate threshold for a finding of future danger. The Texas legislature intentionally left open the question "what probability?" when it used the *indefinite* article and no adjective. This Court has expressly rejected the possibility that there is a determinate threshold for future dangerousness. *Coble*, 330 S.W.3d at 267-68 (noting "Legislature declined to specify a particular level of risk or probability of violence"); *id.* at 268 (requires finding defendant "poses a *real* threat of future violence") (emphasis added); *id.* ("The special issue focuses upon the character for violence of the particular individual, not merely the quantity or quality of the institutional restraints put on that person.").

This Court's cases establish the indeterminacy of the threshold. As one federal court correctly found, this Court has at times said "a probability" within the context of future dangerousness means "more than a bare chance," "more than a possibility," "something between potential and more likely than not," and "more likely than not." *Hernandez v. Davis*, No. EP-15-CV-51-PRM, 2017 WL 2271495, at *25 (W.D. Tex. May 23, 2017) (citing *Smith v. State*, 779 S.W.2d 417, 421 (Tex. Crim. App. 1989); *Hughes v. State*, 878 S.W.2d 142, 148 (Tex. Crim. App. 1992); *Cuevas v. State*, 742 S.W.2d 331, 346–47 (Tex. Crim. App. 1987), *overruled on other grounds in Hughes v. State*, 878 S.W.2d at 142; *Robison v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994)).

Given this intentional lack of guidance as to the threshold level of risk required to support a finding of future danger, the jury is left to determine whether there is a nebulous level of "probability" of whether a jury-imagined "criminal act of violence" will constitute an equally indeterminate "continuing threat to society." This parallels the residual clause's requirement that the judge apply a serious potential risk standard to a "judge-imagined abstraction," a requirement which the Supreme Court found directly contributed to the unconstitutional vagueness of the statute. *Johnson*, 135 S. Ct. at 2558. But because judges have extensive training and experience in defining and recognizing well-founded legal abstractions, and jurors have no such training or

experience, the FDSI is more indeterminate and therefore constitutionally infirm than the residual clauses.

This Court's disparate readings of the statute further illustrate the similarities between judicial variability in the residual clauses invalidated by *Johnson*, *Dimaya*, and *Davis*, and the future-danger factor in Texas.

C. THIS COURT'S CASES PROVE FUTURE DANGER IS NOT APPLIED EVENHANDEDLY, PREDICTABLY, OR CONSISTENTLY

As was the case with the residual clause at issue in *Johnson,* decisions made under the future danger question "have proved to be anything but evenhanded, predictable, or consistent." *Johnson*, 135 S. Ct. at 2563. In order to demonstrate how the residual clause invited speculative and arbitrary enforcement, the Supreme Court in *Johnson* pointed to how different members of the same Court had reached different conclusions regarding the risks posed by an attempted burglary. *Id.* at 2558. The ambiguity inherent in the future danger question has meant that fact-finders have come to wildly different conclusions in cases with substantially similar facts.

Two of this Court's cases, decided only four years apart, are emblematic of this problem. In *Berry v. State*, 233 S.W.3d 847 (Tex. Crim. App. 2007), a mother was convicted of capital murder for the death of her son. 233 S.W.3d at 850. In *Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011), a mother was convicted of capital murder for the death of her daughter. 351 S.W.3d at 880. Berry argued that her "defense experts established she 'had been a threat only to two of her own children, a

threat which [would be] virtually eliminated by a sentence of life imprisonment throughout her child-bearing years.'" 233 S.W.3d at 862. Lucio likewise argued that there was insufficient evidence "to support the jury's affirmative answer to the future-dangerousness special issue because this evidence shows that she is dangerous only to her own children, which appellant would not have access to if she was sentenced to life without parole and spent the rest of her life in prison." 351 S.W.3d at 902. Despite the similarities between the two cases, this Court held that there was insufficient evidence to support a finding that Berry posed a future danger, 233 S.W.3d at 864, while in Lucio's case this Court found that "the evidence [was] legally sufficient to support the jury's affirmative answer to the future-dangerousness special issue." 351 S.W.3d at 905.

Members of this Court have acknowledged the inconsistent applications of the FDSI in *Berry* and *Lucio*. In a concurrence in *Lucio,* Judge Keller remarked that "[i]n some ways, Berry's crime was more heinous, and her criminal history worse, than [Lucio]'s." 351 S.W.3d at 911 (Keller, J., concurring). The disagreement evident in the concurrence in *Lucio* shows that even this Court cannot fully agree on the question of future danger.

The inconsistencies in sentencing which result from the FDSI are not limited to these two cases. *Compare*, *e.g.*, *Beltran v. State*, 728 S.W.2d 382 (Tex. Crim. App. 1987) (finding insufficient evidence of future danger based on the fact it was a

murder committed during the course of a robbery, past DWI convictions, unadjudicated offenses including three burglaries and aggravated assault on a peace officer, and the defendant's bad reputation), *with Cockrum v. State*, 758 S.W.2d 577 (Tex. Crim. App. 1988) (finding sufficient evidence of future danger based on the fact it was a murder committed during the course of a robbery, the defendant's bad reputation, past convictions for burglary and possession of marijuana, hiding of evidence, and attempts to evade police); *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987) (finding insufficient evidence of future danger based on the fact it was a murder committed during a robbery, past conviction for possession of marijuana, the fact defendant laughed when asked if someone would have to be cold-blooded to kill someone, and the lack of psychiatric or character testimony), *with Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996) (finding sufficient evidence of future danger based on the fact it was a murder in the course of a robbery, absence of past convictions, inconsistent statement after defendant turned himself in to police, "frequent" verbal disputes, "apparent disregard for the law and authority," and a lack of psychiatric testimony).

The inconsistent sentences resulting from the ambiguity of the future danger inquiry is evidence of the statute's failure to protect the due process rights of defendants. In *Johnson*, the Supreme Court recognized that "[i]nvoking so shapeless

a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson,* 135 S. Ct. at 2560.

III. Access to Review

A. MR. HALPRIN SATISFIES THE REQUIREMENTS OF SECTION 5(a) OF ARTICLE 11.071

1. Legal Standard

Texas law permits successive writs challenging the same conviction where the applicant's new "claims and issues have not been and could not have been presented previously in a . . . previously considered application filed under Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art 11.071, § 5(a)(1). In order "to satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of this previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or the sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). The legal basis is unavailable if "the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before" the previous application was filed. Tex. Code Crim. Proc. Art 11.071, § 5(d).

2. Application of Law to the Facts of this Case

The Supreme Court decided *Johnson* in 2015. In 2016, the Court made clear that *Johnson* "announced a substantive rule that has retroactive effect in cases on collateral review." *Welch*, 136 S. Ct. at 1268. The legal basis for Mr. Halprin's void-for-vagueness claim could not have been "presented previously," because his initial and subsequent applications predate the Supreme Court's announcement of the new void-for-vagueness rule in 2015. Additionally, the Supreme Court has held "that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, *supra*, 136 S. Ct. at 729.

Accordingly, this Court must find Mr. Haprin's claim falls within § 5(a) of Article 11.071, apply the *Johnson* line of cases, and vacate the death sentence imposed through the application of the State's future-dangerousness requirement which is void for vagueness under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons and those presented in any/all submissions accompanying this Application, Mr. Halprin prays:

1. That the Court of Criminal Appeals find that Mr. Halprin's Application complies with Article 11.071 of the Texas Code of Criminal Procedure;

2. That leave to amend the Application be granted;

3. That summary relief be granted on his claims which are clear from the facts set forth in this pleading and the record;

4. That an evidentiary hearing on the claims and any and all disputed issues of fact be granted;

5. That discovery as may be necessary to a full and fair resolution herein be allowed;

6. That Mr. Halprin's conviction and judgment imposing death be vacated.

7. If the State disputes any averments or legal issues, Mr. Halprin's execution should be stayed to allow for a hearing and briefing commensurate with the seriousness of the issues.

DATED: July 16, 2019

Respectfully submitted,

/s/ Paul E. Manusr
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STATE OF TEXAS §
COUNTY OF GAINES §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Paul E. Mansur, who upon being duly sword by me testified as follows:

1. I am a member of the State Bar of Texas in good standing.

2. I am the duly authorized attorney for Randy Halprin, having the authority to prepare and to verify Mr. Halprin's application of a writ of habeas corpus.

3. I have prepared and read the foregoing application and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:

Paul E. Mansur

SUBSCRIBED AND SWORN TO BEFORE ME ON JULY 16, 2019:

NOTARY PUBLIC STATE OF TEXAS
SAMANTHA RUSSELL
NOTARY PUBLIC
STATE OF TEXAS
MY COMM. EXP. 05/07/23
NOTARY ID 13201049-2

Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July 2019, a copy of the foregoing application was served upon counsel for the State via email to:

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/s/ Paul E. Mansur
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